

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 554

**NATIONAL BROADCASTING COMPANY, INC.,
WOODMEN OF THE WORLD LIFE INSURANCE
SOCIETY AND STROMBERG-CARLSON TELE-
PHONE MANUFACTURING COMPANY, APPEL-
LANTS,**

vs.

**THE UNITED STATES OF AMERICA, FEDERAL
COMMUNICATIONS COMMISSION AND MUTUAL
BROADCASTING SYSTEM, INC.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK**

FILED NOVEMBER 30, 1942.

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[fol. 1]

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

(Equitable Relief Sought)

Civil Action No. 16-178

**NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and Stromberg Carlson
Telephone Manufacturing Company, Plaintiffs,**

v.

**UNITED STATES OF AMERICA and the FEDERAL COMMUNICA-
TIONS COMMISSION, Defendants**

COMPLAINT

To the Honorable the Judges of said District Court:

Plaintiffs, above named, bring this action pursuant to the provisions of the Communications Act of 1934, approved June 19, 1934 (48 Stat. 1064, 1093; Code of Laws of the United States, Title 47, Section 402(a)) and the Urgent Deficiencies Act, approved October 22, 1913 (38 Stat. 219, 220; Code of Laws of the United States, Title 28, Sections 41 and 43 through 48, inclusive), and under the general equitable jurisdiction of this Court, to enjoin, set aside, annul and suspend an Order of the Federal Communications Commission (hereinafter sometimes referred to as the "Commission"), dated May 2, 1941, as amended on October 11, 1941, in proceedings entitled: "In the Matter of the Investigation of Chain Broadcasting, Federal Communications Commission, Docket No. 5060." The Order as issued May 2, 1941 (hereinafter sometimes called the "original Order") was effective immediately except with respect to existing contracts, arrangements or understandings or network organization station licenses and, by amendment of June 13, 1941, except with respect to the maintenance of more than one network by a single network organization. The Order as amended on October 11, 1941 (hereinafter sometimes called the "Order on Rehearing") was immediately effective except with respect to existing contracts, arrangements or understandings, network organization sta-

[fol. 2] tion licenses and the maintenance of more than one network by a single network organization. Insofar as the original Order and the Order on Rehearing were immediately effective, there has been no postponement of effective date. As a result of successive postponements (on July 22, August 28, and October 11, 1941), the effective date of said Order, as amended, has been postponed until November 15, 1941 with respect to contracts, arrangements and understandings existing on May 2, 1941 and network organization station licenses, and the effective date of said Order, as amended (hereinafter sometimes called "the Order"), has been suspended indefinitely with respect to the maintenance of more than one network by a single network organization.

Plaintiffs allege, upon information and belief:

1. Plaintiff, National Broadcasting Company, Inc. (hereinafter called NBC), is a corporation duly organized and existing under the laws of the State of Delaware, having its principal office in the City of New York, State of New York, and in the Southern District thereof.

2. Plaintiff, Woodmen of the World Life Insurance Society (hereinafter called Woodmen), is a corporation duly organized and existing under the laws of the State of Nebraska, having its principal office in the City of Omaha, State of Nebraska and licensed to transact its corporate business in the States of Nebraska and New York.

3. Plaintiff, Stromberg Carlson Telephone Manufacturing Company (hereinafter called Stromberg Carlson), is a corporation duly organized and existing under the laws of the State of New York.

4. The Commission is an administrative tribunal created by said Communications Act of 1934 and is charged with the administration and enforcement of said Act. The Commission was organized on July 11, 1934 and said Act in so far as it relates to action by the Commission became effective on that date.

5. The United States of America is made a defendant in this suit pursuant to the provisions of said Act of Congress approved October 22, 1913 (36 Stat. 1149, 38 Stat. 219; Code of Laws of United States, Title 28, Section 46), known as the Urgent Deficiencies Act, and said Communications

[fol. 3] Act of 1934, approved June 19, 1934 (48 Stat. 1064, 1093; Code of Laws of the United States, Title 47, Section 402(a)).

6. NBC is, and at all times since the effective date of said Communications Act of 1934 has been, a corporation engaged in radio broadcasting and in radio network broadcasting in interstate and foreign commerce and subject to the provisions of said Act.

7. Woodmen and Stromberg Carlson, respectively, are, and at all times hereinafter referred to have been, engaged respectively, in radio broadcasting and in radio network broadcasting in interstate or foreign commerce and subject to the provisions of said Communications Act of 1934.

8. NBC is the owner and operator (under licenses from the Commission) of the following standard broadcast stations, each of which it has been continuously licensed to operate since the date indicated:

Station	Location	Date
WEAF	New York, N. Y.	1926
WJZ	New York, N. Y.	1930
WRC	Washington, D. C.	1930
WTAM	Cleveland, Ohio	1930
KPO	San Francisco, Calif.	1932
WMAQ	Chicago, Ill.	1931
WENR	Chicago, Ill.	1931

NBC acquired Station WJZ from Radio Corporation of America which had become sole owner of said station on or about May 15, 1923 and had used the same as its key station for network broadcasting, beginning as early as December, 1923.

9. NBC is the lessee and operator (under licenses from the Commission) of the following standard broadcast stations, each of which it has been continuously licensed to operate since the date indicated:

Station	Location	Date
KOA	Denver, Colo.	1930
KGO	San Francisco, Calif.	1930
WMAL	Washington, D. C.	1933

[fol. 4] 10. The license for each of the Stations operated by NBC (except that for Station WEAJ, New York, N. Y., which was acquired prior to the enactment of the Radio Act of 1927) has been acquired after NBC made application to the Federal Radio Commission (the predecessor of the Federal Communications Commission as a licensing authority) for a transfer thereof to NBC; and in each instance the Federal Radio Commission acting under the provisions of Section 12 of the Radio Act of 1927 (44 Stat. 1167) granted its consent to the assignment of the license to NBC as requested after having found that public interest, convenience or necessity would be served thereby. In each instance NBC has been granted successive renewals of these licenses (for example, NBC has received 28 renewals of its license for station WEAJ for periods ranging between approximately three months and one year) both by the Federal Radio Commission and the Federal Communications Commission upon findings as required by statute (44 Stat. 1167; 48 Stat. 1085) that the public interest, convenience or necessity would be served thereby. NBC is now, and at all times since 1927 has been, qualified legally, financially, technically, by experience and in all other respects to operate each of said stations.

11. The broadcast transmitters operated by NBC, as aforesaid, exclusive of studios and other properties, represent an investment by NBC in assets (other than good will) having a present value of over \$1,000,000. All of the stations operated by NBC are going concerns which during their many years of operation by NBC have created values for NBC in excess of \$1,000,000, in good will and NBC has also paid large sums of money for the good will value of certain of said stations at the time the same were acquired by NBC.

12. Woodmen is the owner and operator (under a license from the Commission) of standard broadcast station WOW, located at Omaha, Nebraska, which Woodmen has been licensed to operate since 1923.

13. Woodmen has been granted successive renewals of its license to operate Station WOW by said Federal Radio Commission since its creation in 1927 and by the Commission since its creation in 1934 upon findings, as required by statute (44 Stat. 1167; 48 Stat. 1085), that the

[fol. 5] public interest, convenience or necessity would be served thereby, and Woodmen is now, and at all times since 1923 has been, duly qualified, legally, financially, technically, by experience and in all other respects to operate said station.

14. Station WOW, owned and operated by Woodmen as aforesaid, represents an investment by Woodmen in assets (other than good will) having a present value in excess of \$175,000, and said Station WOW is a going concern which, during its 18 years of operation by Woodmen, has created values for Woodmen of over \$500,000 in good will.

15. Stromberg Carlson is the owner and operator (under a license from the Commission) of standard broadcast station WHAM, located at Rochester, New York, which Stromberg Carlson has been licensed to operate since 1927.

16. Stromberg Carlson acquired said Station WHAM by purchase from the prior owner and operator thereof. Stromberg Carlson has been granted successive renewals of its said license to operate Station WHAM both by said Federal Radio Commission since its creation in 1927 and by the Commission since its creation in 1934 upon findings, as required by statute (44 Stat. 1167; 48 Stat. 1085), that the public interest, convenience or necessity would be served thereby.

17. Stromberg Carlson is now, and at all times since 1927 has been, duly qualified, legally, financially, technically, by experience and in all other respects to operate said Station WHAM.

18. Station WHAM, owned and operated by Stromberg Carlson as aforesaid, represents an investment by said Stromberg Carlson in assets (other than good will) having a present value in excess of \$250,000, and said Station WHAM is a going concern which, during its 14 years of operation by Stromberg Carlson, has created values for Stromberg Carlson of over \$1,000,000 in good will.

19. In addition to its operation of radio broadcast stations, as aforesaid, NBC is and since 1926 has been engaged in the business of network broadcasting; i.e., it creates and supplies programs over leased telephone wire circuits simultaneously to stations which NBC itself operates and

[fol. 6] to standard broadcast stations (now numbering more than 200) owned and operated by other persons, firms, or corporations in the United States and Canada. NBC maintains studios and offices in New York, Washington, Chicago, Los Angeles, and other important cities within the United States from which it conducts its said business of network broadcasting and also maintains offices and has employees in many other cities and countries throughout the world. NBC's employees include experienced engineering, sales, program and executive personnel, the total number thereof being in excess of 2,300, many of whom have entered into contracts of employment with NBC requiring NBC to pay out large sums of money as salaries thereunder. NBC owns real property and leases additional real property within and without the United States and is the owner of personal property used and usable in the conduct of its broadcasting and network broadcasting business. NBC's commitments under leases of real property alone are in excess of \$15,000,000. The present value of studio, office and other properties and assets, owned by NBC (exclusive of broadcast transmitters and good will) is in excess of \$3,000,000, and its network activities have created good will values of more than \$10,000,000 additional.

20. NBC's business of network broadcasting is conducted by means of contracts between NBC and the operators of independently owned standard broadcast stations, including Woodmen and Stromberg Carlson, on the one hand and between NBC and advertisers on the other hand. NBC has contracts with the owners of most of the standard broadcast stations which broadcast NBC's network programs (except those stations which NBC itself operates) which fix the rights and obligations of the parties in the handling and broadcasting of such programs as herein-after more fully appears. NBC has contracts with advertisers and advertising agencies for the use of NBC's network facilities to advertise their products, covering advertising commitments, subject to the provisions of said contracts, in an amount in excess of \$28,000,000. NBC has contracts with artists and other skilled personnel to produce and distribute its radio programs to its affiliated network stations pursuant to such contracts.

21. NBC's ability to render a national network service is dependent upon the contracts existing between it and

[fol. 7] the owners of independently owned standard broadcast stations which broadcast its network programs. The ability of the owners of standard broadcast stations affiliated with NBC, including Woodmen and Stromberg Carlson, to furnish their respective listeners with NBC's network programs, both commercial and sustaining, is also dependent upon said contracts. Said contracts are in writing and while similar in substance are not in all respects uniform. In most cases, they provide in effect that for the period of time therein specified: (1) NBC will supply to the station sustaining programs (*i. e.*, programs of entertainment, information, education, news, national and international events and other features not containing advertising material), which programs NBC either itself produces in its own studios and delivers to the station, or delivers to the station from some other point at which the program originates; (2) the station will broadcast commercial programs serving the public interest, convenience and necessity supplied by NBC (*i. e.*, programs of entertainment, information, education, news and other features but also containing advertising material) to the station and NBC will pay the station for the broadcasting of such programs at a rate specified; and (3) the station grants to NBC an option on certain specified periods of the time for which the station is licensed to operate, for the broadcast of commercial network programs. Said provisions are contained in each of said contracts substantially in the form contained in the form of affiliation contract attached hereto as Exhibit A and made a part hereof as fully as though the same were set out herein.

22. Through and by means of the contractual relationship between NBC and individual station owners who broadcast NBC's network programs, including Woodmen and Stromberg Carlson, NBC is now able to render a nationwide network service which has gained wide public acceptance and which is relied upon by NBC's affiliated stations both as a source of revenue and as a source of program material. Through such contractual arrangements, the affiliated stations, including WOW and WHAM, receive: (1) the audience appeal of programs supplied by NBC and which are not otherwise available to the individual stations; (2) sustaining programs which are used by the individual stations to complete their program schedules thereby sav-

[fol. 8] ing them the expense of producing programs for this purpose; and (3) revenue for the sale of the facilities of the stations to advertisers by NBC. Through such contractual arrangements, NBC receives: (a) circulation for commercial programs within the particular market in which the individual station is located; (b) revenue for making such stations available to an advertiser using the network; and (c) an opportunity to build audience appeal in a particular market through the use of NBC's sustaining programs by the station located in that market.

23. NBC's network operations are and since 1927 have been conducted over two groups of standard broadcast stations which are commonly known, and hereafter referred to, as the "Red" and "Blue" networks. In broadcasting radio programs, the Red network and the Blue network generally operate as separate networks, and one program will be broadcast from the group of stations comprising the Red network while a different program is simultaneously broadcast from the group of stations comprising the Blue network, although in exceptional cases the Red and Blue networks may be combined to broadcast the same program. Each of these networks is national in scope so that there is a substantial overlap in the territories served by them. The stations which NBC itself operates are divided between the Red and Blue networks in the following manner:

Red Network	Location	Blue Network
WEAF	New York, N. Y.	WJZ
WMAQ	Chicago, Ill.	WENR
WRC	Washington, D. C.	WMAL
KPO	San Francisco, Cal.	KGO
KOA	Denver, Colo.	—
WTAM	Cleveland, Ohio	—

All of the stations which are owned and operated by others but which are affiliated with NBC in the business of network broadcasting are associated with the Red network or the Blue network or both. Station WOW is associated with the Red network and Station WHAM is associated with the Blue network. The map-chart attached hereto as Exhibit B, which is made a part hereof as fully as though it were set out herein, shows the network association as of June 1, 1941 of all stations owned and operated by, or affiliated with, NBC. As shown by the legend on Exhibit B,

[fol. 9] stations colored red therein are associated with the Red network, stations colored blue therein are associated with the Blue network and stations colored green therein are included in supplementary groups of stations which from time to time may be associated with the Red or Blue networks.

24. NBC, Woodmen and Stromberg Carlson, respectively, allege that each of the stations that they, respectively, operate has been operated in accordance with all applicable statutes and all lawful regulations promulgated by the Commission and that each of said stations is now and at all times referred to herein has been rendering a high quality broadcast service, in accordance with the terms and provisions of the licenses authorizing its operation and in all respects conducive to the public interest, convenience and necessity.

25. NBC further alleges that its contracts with its affiliates, including Woodmen and Stromberg Carlson, are in all respects lawful, are contracts under which NBC and said affiliates are co-venturers in the business of network broadcasting and are contracts under which both NBC and said affiliates have been able to render a greater service in the public interest than would have been possible without such contracts.

26. The Commission on March 18, 1938 entered its Order No. 37, of the same date, which authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity," a copy of which Order is attached hereto as Exhibit C and made a part hereof as fully as though it were set out herein. Hearings were thereafter held and the Commission entered a Report setting forth its findings and conclusions and its original Order in Docket No. 5060, dated May 2, 1941, upon notice to NBC and other interested parties, a copy of which Report and Order is attached hereto as Exhibit D and made a part hereof as fully as though it were set out herein.

27. By the terms and provisions of its original Order in Docket No. 5060, the Commission promulgated eight regulations of general application which purport to be "special regulations applicable to radio stations engaged in

[fol. 10] chain broadcasting," having the force and effect of law. Two of the seven Commissioners dissented. On September 12, 1941, upon notice to NBC and other interested parties, a rehearing was held and thereafter, on October 11, 1941, the Commission issued a Supplemental Report and the Order on Rehearing in Docket No. 5060, amending three of the eight regulations aforesaid, a copy of which Report and Order is attached hereto as Exhibit E and made a part hereof as fully as though it were set out herein. Again, two Commissioners dissented: A copy of the eight regulations promulgated on May 2, 1941, as amended October 11, 1941, is attached hereto as Exhibit F and made a part hereof as fully as though the same were set out herein. All broadcast stations operated by and affiliated with NBC, including Stations WOW and WHAM, are standard broadcast stations engaged in chain broadcasting. All of said regulations have application to the business in which NBC, Woodmen and Stromberg Carlson, respectively, are engaged, either as the operator of one or more broadcast stations or in the conduct of NBC's network business, and all of said regulations adversely affect NBC, Woodmen and Stromberg Carlson.

28. Paragraph 3.101 of the original Order requires the abrogation of any provision contained in any contract, arrangement or understanding between NBC and any standard broadcast station whereunder said station agrees not to broadcast network programs of any network organization other than NBC and said paragraph was not amended by the Order on Rehearing.

29. Paragraph 3.102 of the original Order, as amended by the Order on Rehearing, requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any standard broadcast station whereunder said station obtains exclusive rights in a particular area to the programs of NBC, provided that NBC may grant to a station first call upon the programs of NBC in the station's primary service area.

30. Paragraph 3.103 of the original Order required the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations providing for their affiliation for a period of longer than one year.

[fol. 11] 31. Paragraph 3.103 of the Order on Rehearing requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations providing for their affiliation for a period longer than two years.

32. Paragraph 3.104 of the original Order required the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations, whereunder said station gives NBC a firm option on any part of said station's broadcast time.

33. Paragraph 3.104 of the Order on Rehearing also requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations whereunder said station gives NBC a firm option on any part of said station's broadcast time. Said paragraph prohibits the station from agreeing to clear its time of non-network programs for NBC upon less than 56 days notice and prohibits the station from agreeing to clear its time of the programs of other network organizations for NBC under any circumstances. Substantially all contracts between NBC and its affiliated standard broadcast stations, including NBC's contract with Woodmen and NBC's contract with Stromberg Carlson, contain a provision giving a firm option to NBC on the respective station's time for not less than eight hours per day upon 28 days notice.

34. Paragraph 3.105 of the original Order requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations which does not reserve to said station the right to reject any network program which said station reasonably believes to be unsatisfactory or unsuitable and said paragraph was not amended by the Order on Rehearing. Substantially all contracts between NBC and its affiliated standard broadcast stations, including NBC's contract with Woodmen, contain a provision reserving to said station the right to reject any network program solely upon the ground that the broadcasting thereof would not be in the public interest, convenience and necessity.

[fol. 12] 35. Paragraph 3.108 of the original Order requires the abrogation of any provision in any contract, ar-

rangement or understanding between NBC and any of its affiliated standard broadcast stations whereunder said station is prevented or hindered from or penalized for fixing or altering its rates for the sale of broadcast time for other than said networks' programs and said paragraph was not amended by the Order on Rehearing.

36. The necessary effect of the Order is to require the abrogation or modification of each of the contract provisions between NBC and its affiliated standard broadcast stations described in paragraphs 33 and 34 of this complaint. The Order also prevents the inclusion of any contract provision substantially similar to any of those described in paragraphs 28 through 35, inclusive, of this complaint in any new contract between NBC and any standard broadcast station. Such requirements as imposed by the Commission in the Order would disrupt the ordinary course of NBC's, Woodmen's and Stromberg Carlson's respective businesses, as corporations engaged in radio broadcasting and radio network broadcasting, would damage NBC by loss of revenues in an amount in excess of \$1,000,000 per year and would damage Woodmen and Stromberg Carlson, respectively, by loss of revenues under their affiliation contracts with NBC in an amount in excess of \$100,000 per year each.

37. Paragraph 3.106 of the original Order requires NBC to dispose of (a) all standard broadcast stations in excess of one covering substantially the same service area and (b) any standard broadcast station in any locality where existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency or other related matters) that "competition would be substantially restrained" by the continued ownership of said station by NBC and said paragraph was not amended by the Order on Rehearing. NBC presently operates two stations covering substantially the same service area in each of four cities within the United States, namely, New York, Washington, Chicago and San Francisco. NBC also operates a single station in two other cities, namely, Cleveland and Denver, which said stations in terms of coverage, power, frequency, program quality and in other respects are preferred by listeners and by advertisers over some, if not all, of the other stations located in such cities.

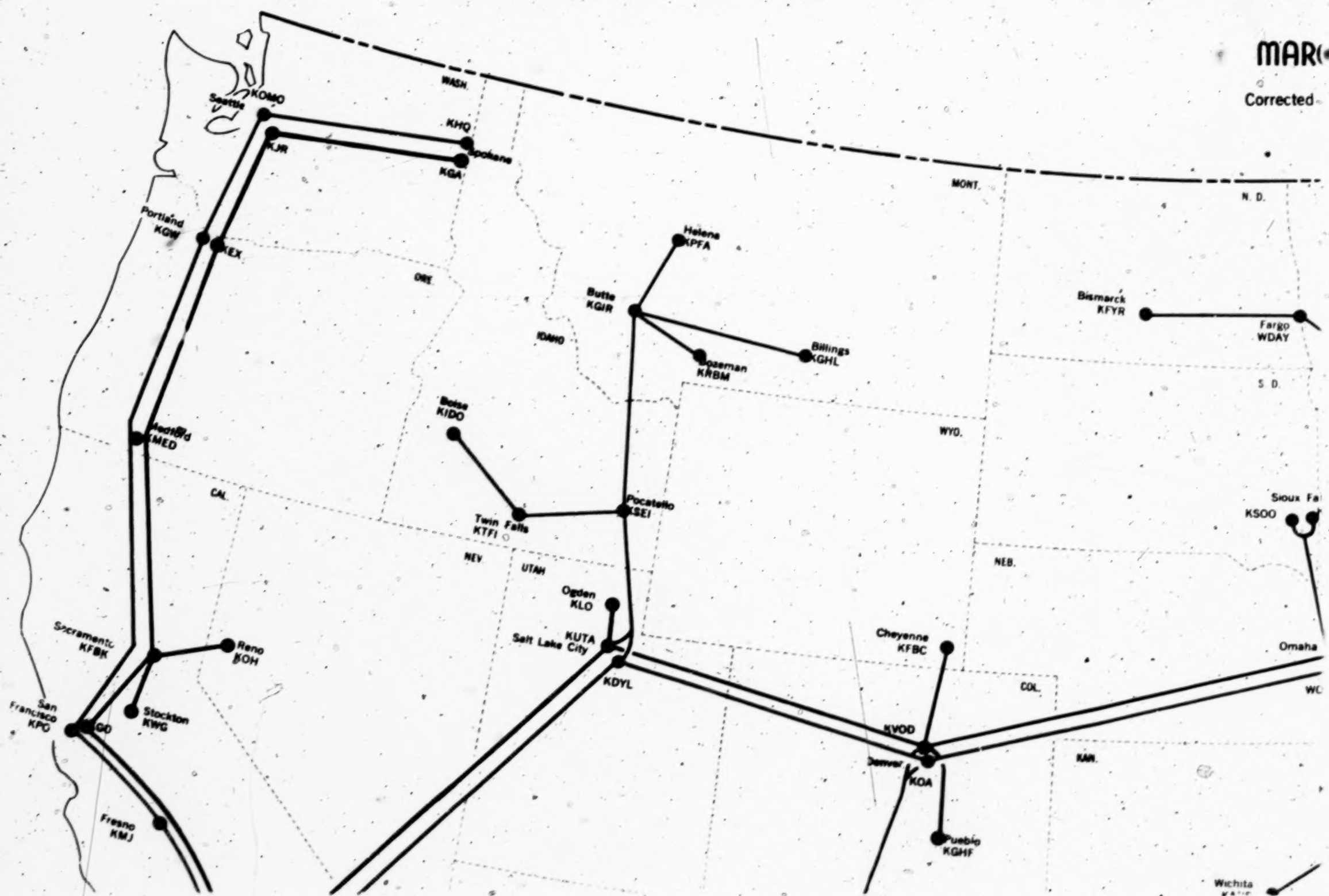
38. The necessary effect of paragraph 3.106 of the Order, as the Order is construed by the Commission in its Report (Exhibit D), is to require NBC to dispose of not less than four of the stations owned or operated by NBC. Such requirement as imposed by the Commission in the Order would terminate or would disrupt and injure NBC's business as a corporation engaged in radio broadcasting and in radio network broadcasting and would disrupt and injure Woodmen's and Stromberg Carlson's respective businesses as corporations engaged, respectively, in radio broadcasting and in radio network broadcasting, all to the damage of NBC by loss of revenues in an amount in excess of \$1,000,000 per year and to the damage of Woodmen and Stromberg Carlson.

39. Paragraph 3.107 of the original Order requires each and every standard broadcast station affiliated with a network organization which maintains more than one network, if such networks are operated simultaneously or if there is a substantial overlap in the territory served by the group of stations comprising each such network, to terminate such affiliation. NBC is a network organization within the meaning of Paragraph 3.107 and the Red and Blue networks now operated by NBC are nation-wide in scope, are operated simultaneously, and there is a substantial overlap in the territory served by the Red and Blue networks, respectively.

40. The necessary effect of paragraph 3.107 of the Commission's Order in Docket No. 5060 would be to require the operator of each and every standard broadcast station affiliated with NBC, including Woodmen and Stromberg Carlson, to terminate its contract of affiliation with NBC, or, in the alternative, to require NBC to dispose of its Red or its Blue network. As hereinabove stated, the effective date of paragraph 3.107 was indefinitely postponed by the Commission on October 11, 1941, but the assertion of power by the Commission contained in paragraph 3.107 has the necessary effect of rendering uncertain and less valuable the operation by NBC of both its Red and its Blue networks and this effect has not been alleviated by the indefinite postponement of the effective date of said paragraph. Such assertion of power by the Commission, notwithstanding the indefinite postponement of said effective date, will in-

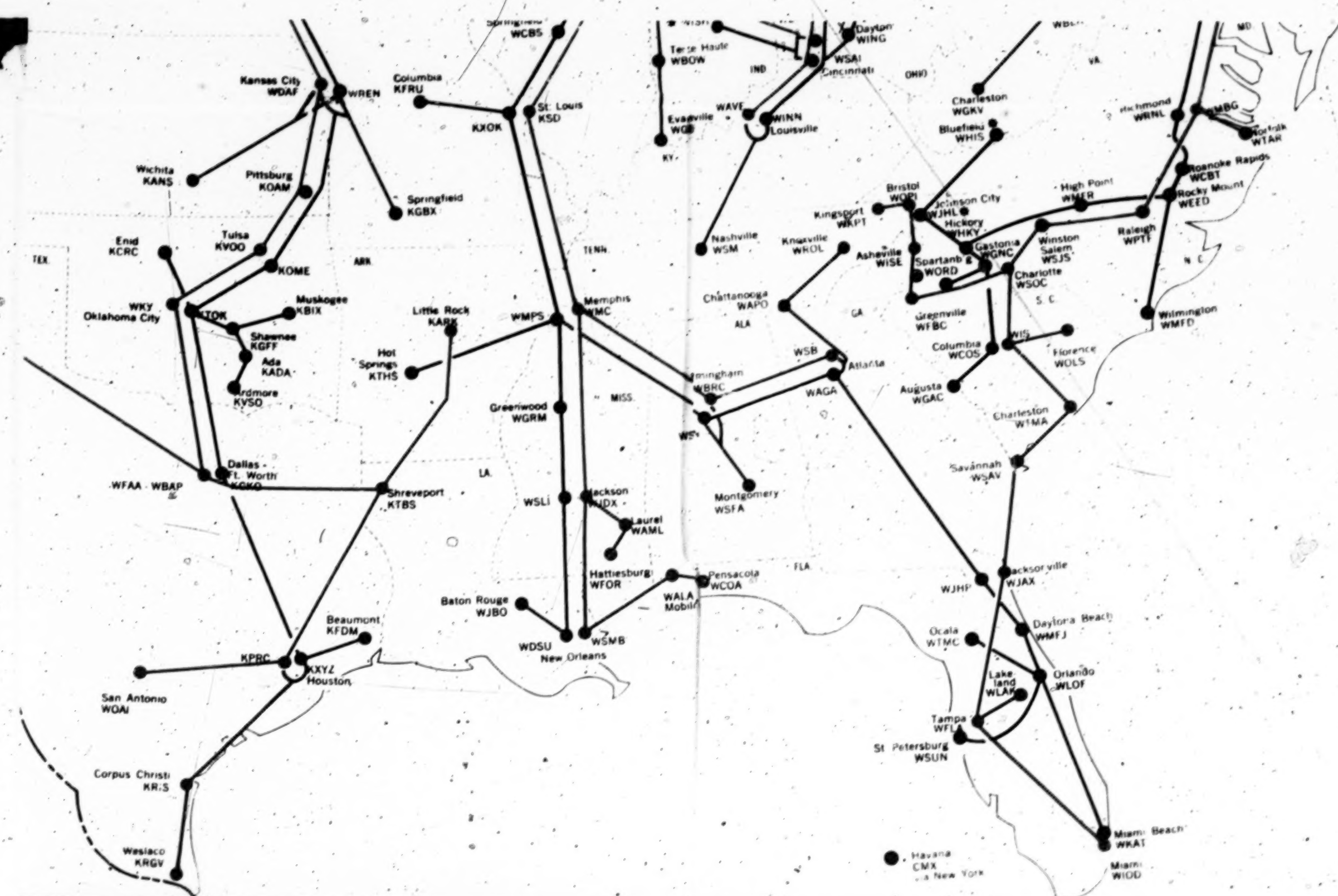
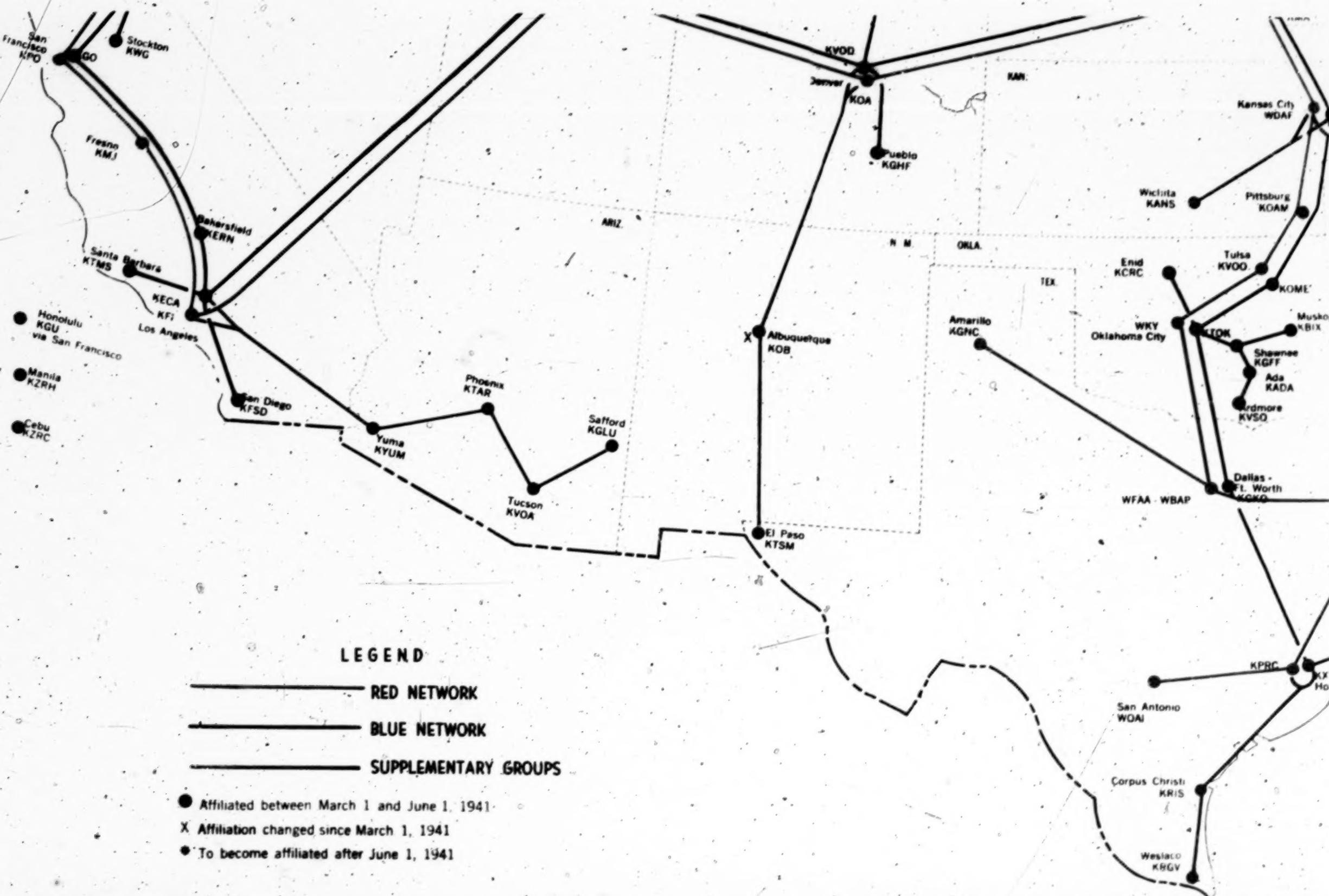
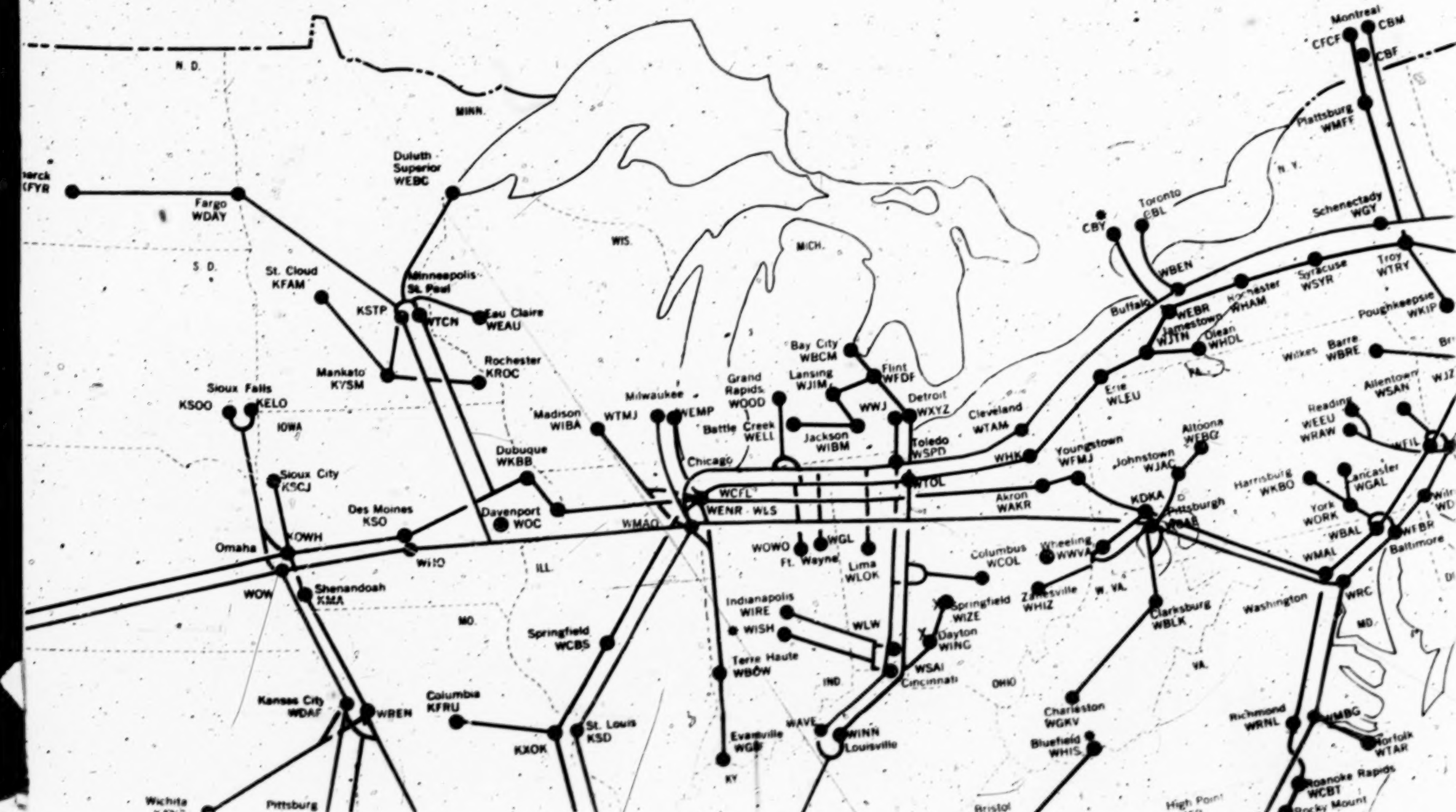
NETWORK FACILITIES OF THE NATIONAL

MAR 1964
Corrected



THE NATIONAL BROADCASTING COMPANY, INC.

MARCH 1, 1941
Corrected to June 1, 1941



jure NBC's business as a corporation engaged in radio broadcasting and in radio network broadcasting and will disrupt and injure Woodmen's and Stromberg Carlson's businesses as corporations engaged, respectively, in radio broadcasting and in radio network broadcasting, all to the great damage of NBC, Woodmen and Stromberg Carlson.

41. Plaintiffs allege that each and every numbered paragraph of the Order is void and beyond the power and authority of the Commission to impose, for each of the following reasons:

(a) The Commission entered the Order upon the basis of considerations and standards not fixed or prescribed by the Communications Act of 1934 and upon which the Commission has no power or authority to pass.

(b) The Commission is without authority under Sections 4(i), 303(f), 303(i) or 303(r) of the Communications Act of 1934 or under any other Section of said Act, to prescribe the terms of contracts, arrangements or understandings between operators of standard broadcast stations, including Woodmen and Stromberg Carlson, and NBC; or to prohibit ownership by a network organization of more than one station in any given locality or the ownership by a network organization of one of a few stations or the most desirable station in a given locality; or to deprive a standard broadcast station of the right to be affiliated with a network organization which maintains more than one network.

(c) By entering the Order, the Commission attempted to fix and prescribe rules governing the licensing of standard broadcast stations, including Stations WOW and WHAM and the stations owned and operated by NBC, different from and at variance with the rule prescribed by Section 307(a) of the Communications Act of 1934 and not otherwise authorized by any law of the United States.

(d) By entering the Order, the Commission attempted to fix and prescribe rules governing the licensing of such standard broadcast stations different from and at variance with the rule prescribed by Section 309(a) of the Communications Act of 1934 and not otherwise authorized by any law of the United States.

[fol. 15] 42. Sections 307(a) and 309(a) of said Communications Act of 1934 provide, in substance, that the Commis-

sion shall grant a station license provided for by said Act if public convenience, interest or necessity will be served thereby. The Commission is not authorized by said Act, nor by any law of the United States, to grant or deny such station license upon any other standard..

43. Plaintiffs allege that each and every numbered paragraph contained in the Order is void and beyond the power and authority of the Commission to impose for the reason that said paragraphs of the Order specify, in substance, that station licenses provided for by said Act shall be denied to any standard broadcast station and to any network organization described therein solely upon the ground that said station has an affiliation contract with a network organization containing any one or more of the provisions described in said paragraphs (as stated in paragraphs 28 through 35 of this Complaint), or that said network organization owns certain facilities described in paragraphs 3.106 and 3.107 of the Order (as stated in paragraphs 37 and 39 of this Complaint), without regard to whether the public interest, convenience or necessity will be served by the granting of each such license.

44. Plaintiffs further allege that each and every numbered paragraph of the Order is void and beyond the power and authority of the Commission to impose for the reason that the Order is arbitrary and capricious and contrary to the public interest.

45. Plaintiffs further allege that if Section 4(i), 303(f), 303(i) or 303(r) of the Communications Act of 1934 are to be construed, separately or collectively, as authorizing or empowering the Commission to issue the Order, then said provisions, and each of them, are unconstitutional and void in that they constitute a delegation of legislative power to the Commission in violation of Article I, Section 1, and Article I, Section 8, paragraph 18 of the Constitution of the United States.

46. Plaintiffs ~~further allege that the order, if authorized~~ by any provision of the Communications Act of 1934, deprives each of them of its property without due process of law contrary to the Fifth Amendment of the Constitution of the United States.

[fol. 16] 47. The Commission is threatening to enforce the Order, in so far as the Order purports to become effective

on or before November 15, 1941, by proceeding for the revocation of station licenses and otherwise, and if Plaintiffs do not comply therewith, each of them will suffer irreparable damage and injury and will also be subjected to loss of its broadcasting license or licenses.

48. Plaintiffs further allege that the Order already has had, and will continue to have, the effect of working irreparable damage and injury upon each of them in the conduct of its business; that because of the provisions of the Order, NBC is unable to negotiate or enter into contracts containing provisions necessary to its network operations or renewals of such contracts with operators of standard broadcast stations, including Woodmen and Stromberg Carlson, which would otherwise enter into or renew such contracts of affiliation with NBC's network organization; that because of the Order, standard broadcast stations now affiliated with NBC under contracts entered into prior to May 2, 1941, are desirous of abrogating said contracts, not less than 48 such stations having served notice of such abrogation; that as a result of the Order, the value of the standard broadcast stations and network organizations now owned and operated by NBC and the value of the standard broadcast stations owned by Woodmen and Stromberg Carlson have diminished, and will continue to diminish; that as a result of the Order, certain advertisers have refused to renew existing contracts and have refused to enter into new contracts for the use of NBC's network facilities; and that the necessary effect of the Order upon the businesses of NBC, Woodmen and Stromberg Carlson as persons engaged, respectively, in radio network broadcasting has been, and will continue to be, such as to render impossible the proper and efficient conduct of such business.

49. NBC, Woodmen and Stromberg Carlson, respectively, have no adequate remedy at law and no method of proceeding exists for the review of the Order except by this action.

Wherefore, plaintiffs pray:

1. That a summons issue under the seal of this Honorable Court and a copy of said summons and of this Complaint be served upon the United States and the Federal [fol. 17] Communications Commission as prescribed by Rule 4(d) (4) and 4(d) (5) of the Federal Rules of Civil Procedure.

2. That this Court, as soon as practicable, convene a specially constituted court of three judges as required by Title 28, Section 47, of the Code of Laws of the United States, and that a temporary or interlocutory injunction be entered herein restraining, enjoining and suspending until the further order of this Court, the operation, execution, and enforcement of the Order, in so far as the Order purports to become effective on or before November 15, 1941.

3. That pending a hearing upon the aforesaid application for a temporary or interlocutory injunction, a preliminary restraining order be issued in terms restraining, enjoining and suspending the operation, execution and enforcement of the Order, in so far as the Order purports to become effective on or before November 15, 1941, until said application for a temporary or interlocutory injunction shall have been heard and determined and for a period of ninety days thereafter.

4. That after final hearing, this Court adjudge, order and decree that the Order, in so far as the Order purports to become effective on or before November 15, 1941, is, and has at all times been, beyond the lawful authority of the Commission, in violation of the legal rights of Plaintiffs, wholly void, and arbitrary and unreasonable and that the Order, in so far as the Order purports to become effective on or before November 15, 1941, be perpetually vacated, set aside, suspended and annulled and the enforcement thereof perpetually restrained and enjoined.

5. That Plaintiffs may have such other and further relief in the premises as to equity and justice may appertain and as may be deemed by this Court to be adequate and proper under the circumstances.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a member of the firm, Attorneys for National Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York. [fol. 18] Thomson, Wood and Hoffman, by John B. Dawson, a member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street,

Borough of Manhattan, City, County and State of New York. Hill, Rivkins and Middleton, by Thomas H. Middleton, a member of the firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York. Goodwin, Nixon, Hargrave, Middleton & Devans, Office and P. O. Address, 31 Exchange St., Rochester, N. Y., Of Counsel for Stromberg Carlson Telephone Manufacturing Company.

Duly sworn to by Niles Trammell et al. Jurats omitted in printing.

EXHIBIT "A" TO COMPLAINT

National Broadcasting Company, Inc.

New York, N. Y., —, 194—.

Radio Station —.

GENTLEMEN:

We are proposing in this letter the following plan of network cooperation between this Company and your Station—.

I. Network Affiliation and Program Service

(1) In order that your station may continue to serve the public interest, convenience and necessity by broadcasting programs of a quality and character generally beyond the reach of individual stations, NBC will, at its own expense, extend its program transmission lines to your control board at your main studios and offer your station network programs of wide variety, including musical, educational, religious, sports, public affairs, international and [fol. 19] special events programs. We will offer to furnish

your station a minimum of 200 unit hours* of our network sustaining and commercial programs combined during each 28-day period, or if we fail to do so we will pay you at the hourly rate of compensation set forth in Section II, Paragraph (1) sub-division (a) of this letter for network commercial programs for any time necessary to make up the difference between the service actually offered to your station and the minimum mentioned above. The network sustaining programs which we offer to furnish are for sustaining use only and may not be sold by your station for commercial sponsorship or used for any other purpose.

(2) In return for the NBC network affiliation, including sustaining program service, you will waive compensation for 16 unit hours of our network commercial programs broadcast by your station during each 28-day period.

H. Station Compensation

(1) Beginning with the effective date of this agreement, we will pay you for each succeeding 28-day period, approximately 15 days after the close of such period, in accordance with the following provisions:

Your compensation for broadcasting our network commercial programs under this arrangement will be based upon an average unit hour rate computed for each 28-day [fol. 20] period by dividing the total value at the network rate for your station of the network commercial programs

* Unit hours are computed according to the following table:

Local Time	1	$\frac{1}{4}$	$\frac{1}{2}$	$\frac{3}{4}$
	Hour Unit	Hour Unit	Hour Unit	Hour Unit
Weekdays:	Hour Credit	Hour Credit	Hour Credit	Hour Credit
12:00 Mid. to 8:00 A. M. ....	.333	.250	.167	.083
8:00 A. M. to 6:00 P. M. ....	.500	.375	.250	.125
6:00 P. M. to 11:00 P. M.	1.000	.750	.500	.250
11:00 P. M. to 12:00 Mid. ....	.500	.375	.250	.125
Sundays:				
12:00 Mid. to 8:00 A. M. ....	.333	.250	.167	.083
8:00 A. M. to 12:00 Noon ....	.500	.375	.250	.125
12:00 Noon to 6:00 P. M. ....	.750	.563	.375	.188
6:00 P. M. to 11:00 P. M.	1.000	.750	.500	.250
11:00 P. M. to 12:00 Mid. ....	.500	.375	.250	.125

broadcast from your station, by the total number of unit hours of such programs during that period.

(a) For the first 25 unit hours in excess of the 16 unit hours covering the network affiliation, NBC will pay you at the rate of 20% of your average unit hour rate for the 28-day period.

(b) For the next 25 unit hours, NBC will pay you at the rate of 30% of your average unit hour rate for the 28-day period.

(c) For all unit hours in excess of 66 unit hours, NBC will pay you at the rate of 37½% of your average unit hour rate for the 28-day period.

(2) The network station rate for your station, on which its compensation will be figured as provided above, will be \$—— per full evening hour. This rate will apply between 6:00 P. M. and 11:00 P. M. local time at your station. Rates for other hours and for shorter periods will be as follows:

	1 Hour Network Station Rate	¾ Hour Network Station Rate	½ Hour Network Station Rate	¼ Hour Network Station Rate
Local Time at Station				

Daily Except Sunday:

12:00 Mid. to 8:00 A. M.—

8:00 A. M. to 6:00 P. M.—

6:00 P. M. to 11:00 P. M.—

11:00 P. M. to 12:00 Mid.—

Sunday:

12:00 Mid. to 8:00 A. M.—

8:00 A. M. to 12:00 Noon—

12:00 Noon to 6:00 P. M.—

6:00 P. M. to 11:00 P. M.—

11:00 P. M. to 12:00 Mid.—

Rates for periods longer than one hour will be in exact proportion to the corresponding one-hour rate. Commissions to agencies and discounts and rebates to advertisers will not be applied to the foregoing rates in computing the average unit hour rate for your station. It is our policy, [fol. 21] however, to allow advertisers using a block of time,

even though it be broken into half-hour and/or quarter-hour contiguous periods for the purpose of advertising separate products, the benefit of the rate applicable to the entire block of time, in which event the rate for your station for such entire block of time will be used in computing the compensation due your station.

(3) NBC reserves the right to change at any time your network station rate to advertisers from that set forth in the preceding table. In the event of such a change, the station compensation due you will be adjusted as follows:

(a) If NBC increases your network station rate to advertisers above that set forth in the preceding table, such increased rate shall be used in computing the station compensation due you on business actually sold by NBC at such increased rate.

(b) Except as provided in subsection (c) of this paragraph, if NBC decreases your network station rate to advertisers below that set forth in the preceding table, such decreased rate shall be used in computing the station compensation due you, provided NBC has given you one year's written notice of its intention to so decrease your station compensation. In the event of such decrease in your station compensation, you may terminate this agreement as of the effective date of such station compensation decrease by giving NBC written notification within ninety days after the receipt of our notice to you to so reduce your compensation.

(c) If NBC decreases your network station rate to advertisers below that set forth in the preceding table and at the same time decreases the network station rate to advertisers of a majority of all NBC network stations, such decreased rate shall be used in computing the station compensation due you, provided NBC has given you ninety days' written notice of its intention to so decrease your station compensation. In the event of such decrease in your station compensation, you may terminate this agreement as of the effective date of such station compensation decrease by giving NBC written notification within thirty days after the receipt of our notice to you to so reduce your compensation.

[fol. 22] · III. Network Optional Time

(1) Upon 28 days' notice, your station will broadcast network commercial programs for NBC during any periods requested by NBC within the hours designated below as Network Optional Time, provided, that because of your public responsibility your station may reject a network program the broadcasting of which would not be in the public interest, convenience and necessity.

Network Optional Time will be as follows:

(New York City Time)

Weekdays	Sundays
10:00 A. M. to 12:00 Noon	1:00 P. M. to 4:00 P. M.
3:00 P. M. to 6:00 P. M.	5:00 P. M. to 6:00 P. M.
7:00 P. M. to 7:30 P. M.	7:00 P. M. to 11:00 P. M.
8:00 P. M. to 11:00 P. M.	

(2) We will give you at least 28 days' advance notice of the discontinuance of any scheduled series of network commercial programs, failing which we will pay you the compensation you would have received if the series had continued for 28 days following the receipt by you of notice of discontinuance, except that you will not be entitled to compensation for any discontinued program for which we substitute another network commercial program. Nothing in this paragraph shall entitle you to compensation as a result of our changing a network program, without 28 days' advance notice, to a time in network optional time for which your station is not already committed to carry a commercial broadcast.

(3) Because of the public responsibility of the network and its Associated Stations, NBC may at any time substitute for any scheduled network program a network program which involves a special event of public importance. No compensation will be paid for the cancelled program or for the substituted program unless the substituted program is commercially sponsored, when the regular compensation will be paid for it.

IV. Announcement Services

(1) You agree to supply upon order from us the services of such personnel and the use of such equipment as

[fol. 23] may be necessary to broadcast, either from your station alone or from your station and to a network of stations, any announcements we may request on any network commercial program broadcast from your station, provided such order is received by you not less than 48 hours in advance of the program on which the announcement is to be made.

(2) Either simultaneously with the placing of such order by us or as soon thereafter as possible, we agree to supply you with the text of such announcements, or a recording of such announcements, together with the necessary instructions as to the time and place in our network program during which we desire such announcements to be made (either by your announcer or by means of the recording) and you agreed to make such announcements in accordance with our instructions. It is understood, of course, you may refuse to broadcast any announcements the broadcasting of which would not be in the public interest, convenience and necessity.

(3) We may cancel any such order for announcements without liability on our part provided we do so upon not less than 48 hours' notice to you, failing which we will pay you the compensation you would have received if the announcements had continued as scheduled for 48 hours following receipt by you of such notice of cancellation.

(4) During a network commercial program which you have agreed to broadcast you agree not to broadcast without our consent any commercial announcements from your station.

(5) As compensation for these announcement services we agree to pay you on approximately the fifteenth day of each calendar month, for each program broadcast by you during the immediately preceding calendar month on which such announcement services are rendered by you at our request, 7½% of your hourly network station rate, applicable to the hour at your station during which such program was scheduled to start.

V. General.

(1) You will submit to NBC daily reports, upon forms provided by us, of all network programs broadcast by your

[fol. 24] station and of all announcements broadcast by you under the provisions of Section IV hereof.

(2) You agree to maintain for your station such licenses, including performing right licenses, as now are, or hereafter may be, necessary for your station to broadcast the programs which we furnish to you hereunder.

(3) Neither you nor ourselves shall incur any liability hereunder because of our failure to deliver or your failure to broadcast any or all programs due to (a) failure of facilities, (b) labor disputes, or (c) causes beyond the control of the party so failing to deliver or to broadcast.

(4) In the event that the transmitter location, power, frequency or hours or manner of operation of your station are changed at any time so that your station is less valuable to NBC as a network outlet than it is at the time this offer is accepted by you, NBC will have the right to discontinue this arrangement upon thirty days' written notice to you.

(5) You agree to keep the operation of the broadcasting equipment of your station entirely under your control for the period during which you are licensed to operate your station. You agree not to assign your station license unless such assignment is expressly made subject to this agreement.

(6) You agree not to authorize, cause, permit, or enable anything to be done whereby any program which we supply to you hereunder may be used for any purpose other than broadcasting by your station.

(7) You agree not to authorize, cause, permit, or enable anything to be done without our consent whereby a recording is made, or a recording is broadcast, of a program which has been, or is being, broadcast on NBC networks.

(8) No waiver by either of us of any breach of any provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other provision.

(9) This agreement shall be construed in accordance with the laws of the State of New York.

(10) Any arrangement with your station relates only to NBC and your station is not related to any arrangement

[fol. 25] that exist or may later be made between NBC and any other station.

(11) This agreement shall become effective at 3:00 A. M., EST, on the — day of —, 194—, and it shall continue for — years thereafter.

If, after examination, you find that the arrangement here proposed is satisfactory to you, please indicate your acceptance on the copy of this letter enclosed for that purpose and return that copy to us.

Very sincerely yours, National Broadcasting Company, Inc., By—. Accepted this — day of —, 194—. By—.

[fol. 202] **Chain Broadcasting Regulations.** During July and August, following these hearings, representatives of NBC, CBS, and Mutual held a series of conferences with the Chairman of the Commission, its General Counsel and members of his staff, and, in the later stages, with Commissioner Walker. Representatives of some of the regional networks and some of the affiliates also conferred with members of the Commission and its staff during this period.³ These conferences were devoted to a discussion of the Chain Broadcasting Regulations, with particular emphasis upon the provisions dealing with network option time. On July 22, 1941, during the course of these conferences, the Commission, on petition of NBC and CBS, postponed the effective date of its Order of May 2, 1941, as to existing affiliation contracts, network organization station licenses, or the maintenance of more than one network by a single network organization, from July 30 until September 16, 1941.

At the termination of these conferences, the Mutual Broadcasting System on August 14, 1941, filed with the Commission a petition requesting it to amend its regulations dealing with network option time and the duration of affiliation contracts. The Mutual petition requested that the Commission permit affiliation contracts up to two years in duration and allow stations to option exclusively to one network the particular periods of time utilized by the network for network commercial programs during the preceding year and to option additional time to one or more networks on a non-exclusive basis; in either case the station to reserve several hours per day free from any network option. On August 28, 1941, Mutual's petition was set for argument before the Commission *en banc* on September 12, 1941 and the Commission announced that at that time it would also hear any other network organizations or licensees who desired to be heard with respect to the Chain Broadcasting Regulations as promulgated, the Mutual petition, or any other modification of any of the Chain Broadcasting Regulations which those appearing desired to propose. The Commission further announced that the Chain Broadcasting Regulations would not be placed in

³ Cf. Report of the Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong. 1st Sess. (1941), pages 35-42.

(Here follows 1 photolithograph, side folio 26)

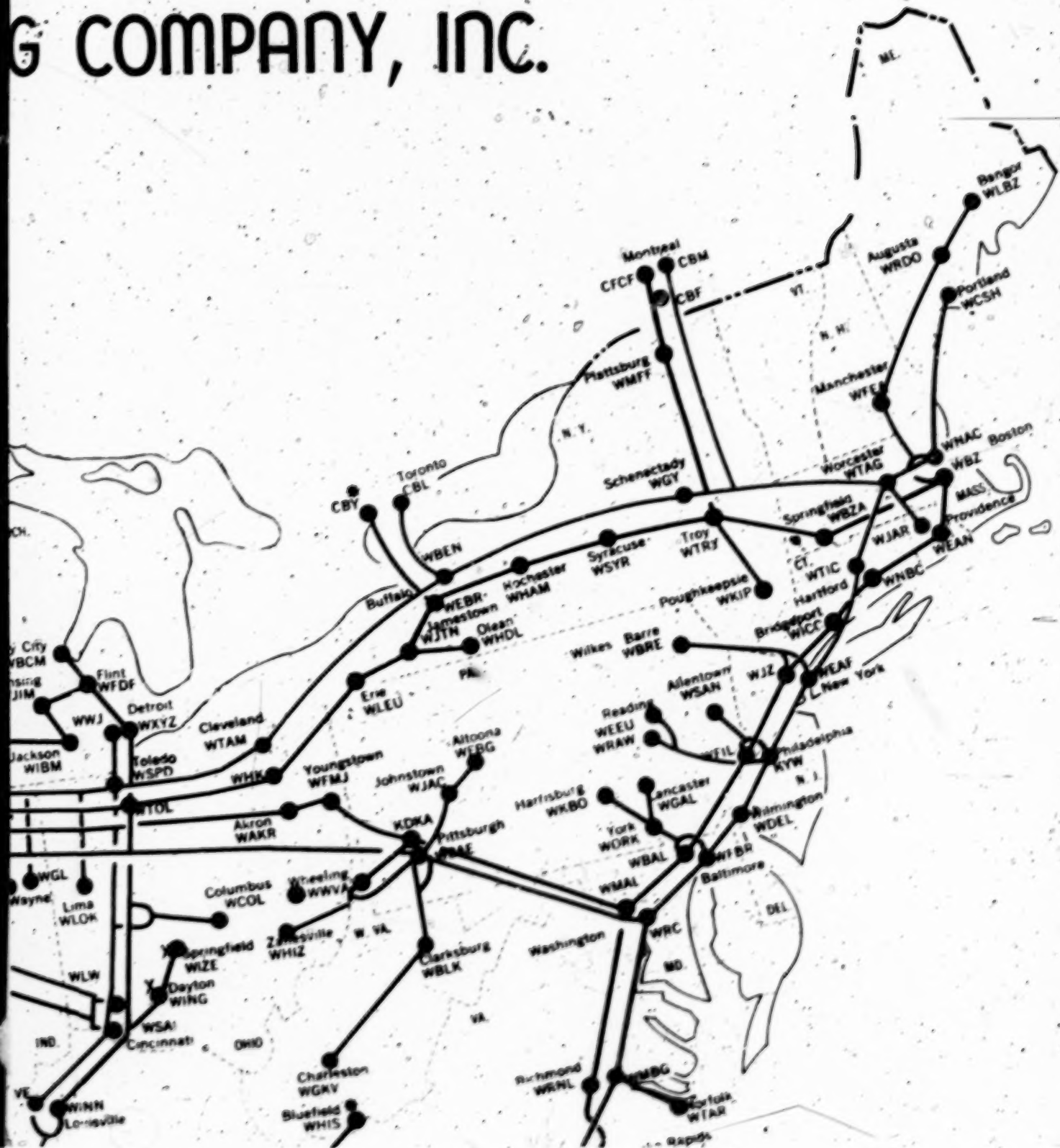
[fol. 203] effect with respect to existing affiliation contracts, or network organization station licensees, or the maintenance of more than one network by a single network organization, until after the disposition of the Mutual petition and of any other which might be filed. Oral arguments on the Mutual petition were heard before the Commission *en banc* on September 12, 1941. Oral arguments were presented on behalf of the Mutual Broadcasting System, the National Broadcasting Company, the Columbia Broadcasting System, and the Colonial and Yankee Networks, and briefs were filed on behalf of the three nation-wide network organizations.

After a careful study of the testimony presented before the Senate Committee on Interstate Commerce, of the considerations presented at the conferences which followed the hearings, and of the oral arguments presented at the hearing on Mutual's petition and of the briefs filed at that time, and after a thorough reconsideration of the entire subject, the Commission has decided to amend three of the Chain Broadcasting Regulations to read as follows:

Regulation 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Regulation 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

G COMPANY, INC.



{fol. 27]

EXHIBIT "C" TO COMPLAINT

Order No. 37

Whereas under the provisions of section 303 of the Communications Act of 1934, as amended, "the Commission, from time to time, as public convenience, interest, or necessity requires, shall—(1) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and

Whereas the Commission has not at this time sufficient information in fact upon which to base regulations regarding contractual relations between chain companies and network stations, multiple ownership of radio broadcast stations, of various classes, competitive practices of all classes of stations, networks, and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result; Now therefore,

It Is Ordered, That the Federal Communications Commission undertake an immediate investigation to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity; such investigation to include an inquiry into the following specific matters, as well as all other pertinent and related matters, including those covered in the report on social and economic data prepared by the Engineering Department of the Federal Communications Commission and filed with the Commission on January 20, 1938:

1. The contractual rights and obligations of stations engaged in chain broadcasting, arising out of their network agreements.
2. The extent of the control of programs, advertising contracts, and other matters exercised in practice by stations engaged in chain broadcasting.
3. The nature and extent of network program duplication by stations serving the same area.
4. Contract provisions in network agreements providing for exclusive affiliation with a single network and also provisions restricting networks from affiliation with other stations in a given area.
5. The extent to which single chains or networks have exclusive coverage in any service area.

[fol. 28] 6. Program policies adopted by the various national and other networks and chains, with respect to character of programs, diversification, and accommodation of program characteristics to the requirements of the area to be served.

7. The number and location of stations licensed to or affiliated with each of the various national and other networks. The number of hours and the specified time which such networks control over the station affiliates and the number of hours and the specified time actually used by such networks.

8. The rights and obligations of stations engaged in chain broadcasting so far as advertisers having network contracts are concerned.

9. Nature of service rendered by each station licensed to a chain or network organization, particularly with respect to amount of program origination for network purposes by such stations.

10. Competitive practices of stations engaged in chain broadcasting as compared with such practices in the broadcasting industry generally.

11. Effect of chain broadcasting upon stations not affiliated with or licensed to any chain or network organization.

12. Practices or agreements in restraint of trade or furtherance of monopoly in connection with chain broadcasting.

13. Extent and effects of concentration of control of stations locally, regionally, or nationally in the same or affiliated interests, by means of chain or network contracts or agreements, management contracts or agreements, common ownership or other means or devices, particularly insofar as the same tends toward or results in restraint of trade or monopoly.

It Is Further Ordered. That hearings be held in connection with such investigation at such times and places as the Commission shall designate.

It Is Further Ordered. That a copy of this order be posted in the office of the Secretary and that a copy of the same be mailed to each licensee of a broadcast station and to each chain and network organization.

By the Commission.

T. J. Slowie, Secretary

[pages 29 to 200]

EXHIBIT "D" TO COMPLAINT

[Omitted]

[fol. 201]

EXHIBIT "E" TO COMPLAINT

Supplemental Report on Chain Broadcasting

(October 11, 1941)

By the Commission

(Chairman Fly, Commissioners Walker, Payne and Wakefield; Commissioners Case and Craven dissenting)

On May 2, 1941, the Commission promulgated its Report on Chain Broadcasting accompanied by eight regulations setting forth a statement of the policy to be followed by the Commission in licensing stations owned by or affiliated with network organizations. The concluding paragraph of the order promulgating the regulations dealt with their effective date, which, with respect to existing affiliation contracts and station licenses, was set at 90 days from the date of the order.¹ On June 13, 1941 the Commission amended the concluding paragraph of the order to clarify its intent that the 90-day deferment period mentioned in that paragraph should apply to the disposal of one NBC network as well as to the disposition of individual stations by networks, and further that the effective date of compliance in either case might be extended from time to time in order to permit the orderly disposition of properties.

Extensive hearings before the Senate Committee on Interstate Commerce were held during June, 1941 on the White Resolution² which called for a study of the Commission's

¹ *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060, May, 1941.

² Senate Resolution No. 113, 77th Congress, 1st Session. The Resolution, introduced by Senator White, provided for an investigation of the probable effect of the regulations upon the broadcasting industry and of the authority of the Commission to promulgate and enforce them, and also requested the Commission to postpone the regulations until 60 days after the Senate Interstate Commerce Committee reported to the Senate. The hearings before the Committee were adjourned on June 20, 1941, subject to the call of the Chairman.

[fol. 204] Regulation 3.104. No license shall be granted to a standard broadcast station which options¹ for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours² within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.³ Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

Territorial Exclusivity

At the hearings on the White Resolution it was argued on behalf of NBC and Columbia that Regulation 3.102 would permit the largest and most powerful stations in each city to take most of the desirable network business away from the smaller and less powerful stations, and that the elimination of territorial exclusivity would prevent a regular affiliation between a network organization and a station. [fol. 205]. In order to clarify the meaning of Regulation

¹ As used in this regulation, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

² All-time options permitted under this regulation must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified option hours correspondingly as agreed by the station and network organization.

³ These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

3.102 the Commission has determined to add the following sentence to that regulation:

"This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

This sentence does not change the meaning¹ of Regulation 3.102 but is intended to eliminate confusion with respect to its interpretation. Regulation 3.102 is not intended to and does not prohibit a regular affiliation contract whereby a network agrees to make a first offer of all its programs to one particular station in a given community. The Commission believes, however, that in the case of non-commercial public service programs of outstanding national or international significance, such first offer should not constitute an exclusive offer and that the network should be left free to furnish such programs to other stations in the same area.

Duration of Affiliation Contracts

Under present rules the license of a standard broadcast station is limited to one year. The broadcast industry has reached a point of maturity where it appears advisable to increase the license period of standard broadcast stations to two years. The Commission believes that this action will bring an increased measure of stability to the broadcast industry without any detrimental results. By separate action taken this day we are amending Sections 3.34 and 4.3 of our rules to accomplish this result.

In connection with the extension of the license period for all standard broadcast stations from one year to two years, the Commission has determined to license stations [fol. 206] which have entered into affiliation contracts whose term is not longer than two years. In its report, the Com-

¹ In its public notice No. 51314 dated June 19, 1941, the Commission informally approved the new Mutual network form of contract which contained a provision giving the station the first call on Mutual network commercial and sustaining programs in the city in which the station is located.

mission found that the five-year affiliation contracts entered into by NBC and CBS were intended to prevent any real competition in the network station market, and that such long term contracts were a substantial factor in suppressing such competition. The Commission found that as a result the public lost the benefits of competition between stations for affiliation with the existing networks, and was also deprived of the advantages that might flow from the establishment and development of new networks. In its report of May 2, 1941, the Commission found that no business need was shown for an affiliation contract longer than one year. The Commission also found that competition would be fostered if opportunity were provided for annual readjustments on the basis of comparative showings of networks and stations.

After a consideration of the arguments presented on Mutual's petition and a reconsideration of the entire subject of the duration of affiliation contracts, the Commission concludes that a two-year affiliation contract will permit a reasonable measure of stability in network-station relationships without at the same time seriously interfering with competition in the network-station market. Of course, what precise limit on the duration of affiliation contracts is most desirable is a matter of judgment. A two-year affiliation contract represents a substantial diminution from the five-year term currently being utilized by NBC and CBS, and may be expected to remove that restraint upon competition and give freer play to competitive factors by making possible readjustments between stations and networks on a biennial basis.

Network Option Time

The option-time regulation promulgated by the Commission on May 2, 1941 (Regulation 3.104), prohibited all optioning of time by stations for network programs. That regulation was based upon the finding of the Commission that the optioning of time by licensee stations restricted their freedom, interfered with their ability to serve local program needs, hampered their efforts to broadcast local programs, national spot, and other non-network programs, and restricted competition in network programs.

[fol. 207] Notwithstanding these serious restraints imposed upon station licensees by network options, NBC and

NBC utilize only a fraction of the valuable broadcast hours which they place under option. The NBC option for most of its affiliates covers 8 or 8½ specified hours per day, while the CBS option covers the entire broadcast day. Upon 28 days' notice, NBC and CBS may call upon their outlets to carry network commercial programs during the optioned time and to move whatever other programs they may have scheduled during those periods. In 1938 NBC used for network commercial programs only 58.1 per cent of the optioned time of stations on the basic Red network and only 19.4 per cent on the basic Blue network and CBS used only 39 per cent of the optioned time of its basic stations. The Commission found that this great disparity between option and use was an abuse which seriously interfered with the non-network program service of station licensees and restricted the broadcasting of programs of other networks.

The Commission is not convinced by the contention of NBC and CBS that the optioning of time by networks is indispensable to network operations, particularly since the chain broadcasting regulations, neither in their original form nor as herein amended, place any restrictions on the bona fide purchase of station time by networks. Networks have heretofore successfully operated without option time. However, it is clear that some optioning of time by networks in order to clear the same period of time over a number of stations for network programs will operate as a business convenience. Within certain limits, it should be possible for stations to option time for network programs without interfering too seriously with their local program requirements, with their local and national spot business, and without restricting the access of competing networks to those stations. The Commission believes that the option-time regulation as herein amended accomplishes that result.

Under the amended regulation the broadcast day is divided into four segments: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; and 11 p. m. to 8 a. m. A station is permitted to option up to three hours during each segment to one or more network organizations on a non-exclusive basis. The regulation provides that the hours covered by option must be specified hours; for, if a roving option [fol. 208] were permitted, the station would be effectively prevented from scheduling any non-network programs during any of the hours on which such roving option might

conceivably settle. Stations are prevented by the regulation from optioning any time to networks subject to call on less than 56 days' notice. The call period currently being utilized is 28 days. This lengthening of the call period will give stations greater freedom in scheduling local and non-network national programs during the hours of the broadcast day which are subject to network option; for such programs, even though subject to be moved, may be assured of at least eight weeks of continuous broadcasting. Nor does it seem that the increase in the call period will seriously affect national network business; for the national networks have pointed out that theirs is a long-range business and that large-scale national advertising network programs are usually planned and arranged for many months and even a year or two ahead of the actual commencement of the broadcasts. Under such circumstances, it does not appear that a 56-day call period will impose any serious hardship upon national network operations.

One of the results of the amended option-time regulation will be that during at least two specific hours within each of the important three segments of the broadcast day—morning, afternoon, and evening, a station may not option time for network programs, so that non-network programs may be scheduled during these hours without fear of removal as a result of network options. During the night segment, from 11 p. m. to 8 a. m., a station may option up to three hours for network programs. For the most part, programs broadcast within those hours have been local programs; but some networks, Colonial, for example, have originated programs during the early morning or late evening hours which have been broadcast by their outlets with apparent wide listener acceptance.

The amended option-time regulation does not require any station to option any time to any network; it simply sets the maximum amount of time which a station may place under option for network programs. Stations and networks are free to negotiate which specific hours are to be placed under option and how many hours, within the limits specified in the regulation, are to be placed under option. A network, by virtue of whatever option it is successful in negotiating, to that extent secures the right-of-way [fol. 209] over local and national non-network programs during the time under option. But during at least two speci-

fied hours within each of the three more important segments of the broadcast day and during at least six hours of the night segment a station may not option time for network programs. Local and non-network national programs being broadcast within such periods may not be subjected to be moved as a matter of contract in order to accommodate network programs, and the networks may utilize such hours only by the outright purchase of time.

It has been the consistent intention of the Commission to assure that an adequate amount of time during the good listening hours shall be made available to meet the needs of the community in terms of public expression and of local interest. If these regulations do not accomplish this objective, the subject will be given further consideration.

By providing that the options for network programs must be on a non-exclusive basis, the amended option-time regulation prevents the option-time device from being utilized to restrain competition offered by other networks. While a station is not compelled to option the same hours to more than one network, it may not enter into any arrangement with one network organization which prevents it from optioning or selling the same or other time to other network organizations. This is an all-important consideration in the many cities which contain only three full-time stations to which all four national networks seek access. Where a station options the same period of time to several networks, the mere existence of the option will not preclude network competition; for that period of time will be available for sale by all the networks holding the option. The first network which is successful in selling any particular period under option will, of course, reap the benefit of the option as long as the time remains sold. Although they have used only a fraction of the optioned time of their outlets, CBS and NBC have been able to prevent a competing network from using the unused time of their affiliates simply because those periods are under option to them. Under the amended option-time regulation, NBC and CBS will be able to exclude other networks only in the event and to the extent that they actually utilize the time under option.

The non-exclusive option should be instrumental in fostering competition between networks and at the same time should make it possible for a network organization to clear [fol. 210] time over a number of stations for a network

program. Without any optioning of time, the greatest obstacle in the way of clearing the same period of time over a number of stations for a network program would be the fact that many of the stations might have scheduled local and non-network national programs during various periods of the broadcast day. During whatever period of time is included within the non-exclusive option, local and non-network national programs will be subject to be moved on 56 days' notice. A station must remain free, however, to sell or option time, included within the non-exclusive option period but not actually being utilized for a network commercial program, to one or more other network organizations.

After weighing the considerations in support of the non-exclusive option against those advanced in opposition, the Commission has come to the conclusion that the non-exclusive option appears to be a particularly appropriate solution of the problem of clearing time for network programs and at the same time of fostering competition in the network-station market.

The Commission has rejected the proposal, suggested but not unqualifiedly recommended in the Mutual petition, to permit a station to option exclusively to one network the particular periods of time utilized by that network for network commercial programs over the station during the preceding year. An exclusive option effectively removes a station from the station-network market with respect to all the time it covers. The Commission believes that such a serious restraint upon competition is inconsistent with the freely competitive system contemplated by Congress in the Communications Act of 1934. An exclusive option, to the extent that it encompasses the most valuable broadcast hours, approaches the effectiveness of the exclusivity clauses in affiliation contracts in denying other networks access to a station, and is therefore objectionable for many of the reasons given in the Report for the elimination of exclusive affiliation. Nor is the fact that a given network has utilized a particular period of time over a station any real justification for placing that time under exclusive option. The network which has a contract for a commercial program with a sponsor and which has been sending that program to a number of its affiliated stations throughout a season already has an almost insuperable advantage in

selling that program for another year; for commercial program series are frequently renewed year after year. To permit such a network to have an exclusive option over its affiliated stations on the periods used for commercial network programs would effectively destroy the possibility of competition for those periods.

Multiple Network Operation by NBC

The Commission has determined to suspend indefinitely Regulation 3.107, which provides that no license shall be granted to a standard broadcast station affiliated with a network organization which maintains more than one network. Separate ownership of what are now the Red and Blue networks of NBC is so generally recognized to be desirable that we believe a separation will soon occur without the spur of a legal mandate. Any policy requiring the sale of substantial properties should be applied with due regard for the preservation of fair values, and the Commission wishes to avoid the semblance of pressure on NBC to effect a forced sale.

In addition to suspending this regulation, the Commission has provided that any subsequent order placing the regulation in effect shall provide for a period of at least six months between the announcement and the effective date, and for further extension of the effective date from time to time if necessary to prevent a forced sale. As amended, the paragraph setting forth the effective date of the Chain Broadcasting regulations reads as follows:

"It is further ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, that the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely, and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

Other considerations have motivated the Commission in this decision. The Commission is desirous of seeing that [fol. 212] the network which is disposed of by NBC is transferred to a responsible new owner as a going organization with its personnel, talent, programs and stations intact as far as possible. NBC's existing affiliation contracts and those that it may negotiate in the future will be an important factor in the continued profitable and efficient operation of its networks. Therefore, pending the development of plans for the disposition of one of the NBC networks as a unit, the Commission has deemed it wise to suspend this regulation.

Conclusion

The Commission adheres to the views expressed in its report on Chain Broadcasting. It is of the opinion that the chain broadcasting regulations will tend to decentralize the tremendous power over what the public may hear which is now lodged in the major network organizations, and will remove existing restraints upon competition without interfering unduly with the operations of the network organizations. The Commission has further concluded, however, that the regulations may be amended as set out above without sacrifice of these objectives, and that the amendments will additionally insure that no aspect of the network broadcasting structure will be unnecessarily or unduly disturbed.

For the reason stated at pages 77 to 79, of its Report, the Commission has determined that its chain broadcasting regulations should be applicable to regional as well as national networks. Special circumstances and considerations may be applicable in the case of regional networks, and the Commission will examine any further representations on their behalf with especial care.

The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation.

[fol. 213] Federal Communications Commission

Washington, D. C.

October 11, 1941.

ORDER

At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941,

The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

It is ordered, That the Commission's order of May 2, 1941, entered in Docket No. 5060, be and the same is hereby, amended in the following particulars:

Sections 3.102, 3.103, and 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two [fol. 214] years: *Provided*, That a contract, arrangement,

or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Section 3.104. No license shall be granted to a standard broadcast station which options ¹ for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours ² within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.³ Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

The last paragraph of said order is hereby amended to read as follows:

"It is further ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall [fol. 215] be deferred until November 15, 1941; *Provided*

¹ As used in this section, an option is any contract, agreement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

² All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

³ These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

further, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

T. J. Slowie, Secretary.

Dissenting Opinion of Commissioners Norman S. Case and T. A. M. Craven

We disagree with the supplemental report of the Commission on Chain Broadcasting, in Docket 5060, for the same basic reasons previously outlined in our dissenting opinion, filed with the Commission's original report on this matter, dated May, 1941. We remain convinced that the majority of the Commission exceeds the power delegated to the Commission in the Communications Act of 1934. We also are convinced that the aggregate effect of the proposed rules will not result in a broadcasting system more in the public interest than that of today. We fear that the nation's radio service may be seriously impaired at a time when efficient service is most needed. Furthermore, we believe that the effect of the rules is certain to result in deterioration of the present excellent public service programs now rendered to the nation by the radio industry.

The effect of the regulations will be to change radically the business structure of the broadcast industry. The present is no time to force revolutionary reforms upon an industry which has served the public interest of the nation, particularly when such reforms bear no relation whatsoever to the national defense effort. The radio industry has cooperated wholeheartedly with the Government in this national emergency in spite of the fundamental and imminent changes in the national economic structure. These economic changes may cause vast readjustments in all industry as well as by the entire public. The cumulative effect of these basic national economic readjustments upon the radio [fol. 216] industry cannot be determined with accuracy at this time. Therefore, it appears to us that to add to the

instability of the radio industry by enforcing new Government regulations, which in themselves superimpose fundamental economic readjustments, is unwise. There is no evidence in this record which justifies such a sweeping change as is compelled by these new rules promulgated by the majority of this Commission. Any improvements which may seem desirable in the operation of the existing broadcast structure can be obtained in an evolutionary manner by far less harsh measures than those proposed by the majority in the instant case.

We do not condone unreasonable restraints upon competition within the broadcasting industry of this country and, therefore, advocate that if any abuses of this nature exist they should be corrected forthwith either by voluntary action within the industry or else by procedures undertaken by agencies of the Government having legal jurisdiction in the premises. Likewise, we subscribe to the doctrine of reasonable diversification in the control of the radio broadcasting channels. It is for this latter reason that we believe the ultimate separation of one of the two networks now operated by the National Broadcasting Company will be an improvement of benefit to the public.

In this respect, however, we believe that the Government should not force private enterprise to dispose of its property on an unsound business basis when such enterprise has rendered good service to the public, and particularly when, as in this case, the Government itself has previously given its tacit approval and encouragement to the enterprise. Consequently, we welcome the fact that the majority has suspended the effective date of its original regulation (Sec. 3.107) to force the sale of one of the networks now operated by the National Broadcasting Company.

Our present objection is centered on the modified regulation, 3.104. Ostensibly this regulation permits options to be taken by a network on an affiliated station's time. In reality, however, an affiliate must be free to option identical time to all networks regardless of affiliation. Under such conditions it should be obvious that absurd complexities may easily arise in the ordinary conduct of business. It is true that another regulation permits a station to contract with a network for first call on a network's program offerings. If it be reasonable for an affiliate to contract for [fol. 217] first call on a network's programs, it is obviously reasonable for the network to obtain first call on the affiliate

station's time. However, the latter is specifically prohibited by the regulation. Apparently by changing the regulation originally promulgated, the majority intended to recognize the practical business situation in broadcasting. It is our opinion that the new regulation does not accomplish this purpose and that networks in reality secure no substantial option privileges under this regulation. We believe that stations should be permitted to utilize the same option principles as is done in ordinary business.

The time has come to create stability in the radio industry rather than instability. We believe that service to the public would be enhanced by extending the broadcast station license period to the legal limit of three years. Network companies should be permitted to contract for regular affiliates with which they can engage in business in accord with sound business principles. In this connection we believe that an improvement in the existing situation can be obtained if network affiliates are free at all times to exercise final judgment as to whether or not any program offered to them by the network will serve public interest in the community served by the station. We also believe that the affiliates should have equal power with the networks to terminate the affiliates' contract on due notice.

(Signed) Norman S. Case, T. A. M. Craven.

October 11, 1941.

EXHIBIT "F" TO COMPLAINT

Order in Docket No. 5060 as Issued May 2, 1941 and Amended October 11, 1941

3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization¹

¹ The term "network organization," as used herein, includes national and regional network organizations.

under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

[fol. 218] 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organ-

ization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

3.104. No license shall be granted to a standard broadcast station which options ¹ for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours ² within each of four segments

¹ As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

² All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[fol. 219] of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m.

to 8 a. m.³ Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which [fol. 220] maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

³ These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

⁴ The word "control," as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than network's programs.

It Is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION

SIRS:

Please Take Notice that the undersigned will bring the attached motion for a preliminary injunction and a temporary restraining order on for hearing before this Court in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, the City of New York, on the 7th day of November, 1941 at 10:30 o'clock A. M., or as soon thereafter as a statutory Court composed of three Judges can be convened, pursuant to the Urgent Deficiencies Act, approved October 22, 1913 (38 Stat. 219, 220; Code of Laws [fol. 221], of the United States, Title 28, Section 47) and counsel can be heard.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a Member of the Firm, Attorneys for National Broadcasting Company, Inc., Office and Post

Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York. Thomson, Wood and Hoffman, by John B. Dawson, a Member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York. Hill, Rivkins and Middleton, by Thomas H. Middleton, a Member of the Firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York.

To: Honorable Francis Biddle, Attorney General of the United States of America, Department of Justice, Washington, D. C.; Federal Communications Commission, Washington, D. C. Honorable Mathias F. Correa, United States Attorney for the Southern District of New York, U. S. Court House, Foley Square, New York, New York.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION AND FOR TEMPORARY
RESTRAINING ORDER

Upon the verified Complaint in this action and the annexed affidavits of Niles Trammell, John J. Gillin, Jr., and Edward A. Hanover, Plaintiffs National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg Carlson Telephone Manufacturing Company move the Court:

(1) For a preliminary injunction in the above-entitled cause, temporarily restraining, enjoining and suspending, pending the final hearing and determination of this cause, [fol. 222] the Order of Defendant Federal Communications Commission, adopted and served upon May 2, 1941, as amended by the Order of said Commission adopted and served upon October 11, 1941, in a proceeding before said

Commission, identified as "In the matter of the Investigation of Chain Broadcasting, Federal Communications Commission, Docket No. 5060", in so far as the Order, as amended, purports to become effective on or before November 15, 1941, and also temporarily enjoining, pending such final hearing and determination, Defendants the United States and Federal Communications Commission, their respective agents, servants, employees, representatives, attorneys and all persons in active concert or participation with them, or any of them, from promulgating, publishing or holding out or causing or permitting to be promulgated, published or held out as effective or valid or authorized by law said Order, purporting to become effective as aforesaid; from, under the purported authority of said Order, revoking any license to operate a standard radio broadcast station now held by Plaintiffs, or any of them; and from, under the purported authority of said Order, threatening any standard broadcast station with loss or denial of such a license; and

(2) For a temporary restraining order in said cause, temporarily staying, suspending and enjoining, pending a hearing and determination upon the aforesaid motion for a preliminary injunction and for a period of 90 days thereafter, the operation, execution and enforcement of said Order purporting to become effective as aforesaid by any Defendant or any agent, servant, employee, representative or attorney of any Defendant or any person in active concert or participation with any of them; and

(3) For such other and further relief in the premises as to equity and justice may appertain and as may be deemed by the Court to be adequate and proper under the circumstances.

The grounds in support of this motion are as follows:

1. Unless restrained, Defendants will promulgate, publish and hold out as effective, valid and authorized by law said Order of the Federal Communications Commission, dated May 2, 1941, as amended on October 11, 1941, in proceedings entitled: "In the Matter of the Investigation of Chain Broadcasting, Federal Communications Commission, Docket No. 5060." The Order as issued May

2, 1941 was effective immediately except with respect to existing contracts, arrangements or understandings or network organization station licenses and, by amendment of June 13, 1941, except with respect to the maintenance of more than one network by a single network organization. The Order as amended on October 11, 1941 was immediately effective except with respect to existing contracts, arrangements or understandings, network organization station licenses and the maintenance of more than one network by a single network organization. Insofar as the Order and the Order as amended were immediately effective, there has been no postponement of effective date. As a result of successive postponements (on July 22, August 28, and October 11, 1941), the effective date of said Order, as amended, has been postponed until November 15, 1941 with respect to contracts, arrangements and understandings existing on May 2, 1941, and network organization station licenses and the effective date of said Order, as amended (hereinafter sometimes called "the Order"), has been suspended indefinitely with respect to the maintenance of more than one network by a single network organization. Unless restrained the Defendants will, under the purported authority of the Order, instruct operators of standard broadcast stations who were not affiliated with Plaintiff National Broadcasting Company, Inc. on May 2, 1941, not to enter into affiliation contracts with said Plaintiff in the usual form under threat of revocation of their licenses or denial of any application for licenses or renewals thereof made by them; Defendants will, under the purported authority of the Order, on or after November 15, 1941, institute proceedings for the revocation of licenses to operate standard radio broadcast stations now held by Plaintiffs and each of them; and Defendants will also thereunder take notice of and consider as operation contrary to the public interest, convenience and necessity, the operation of hundreds of standard broadcast stations, including those owned or operated by Plaintiffs Woodmen of the World Life Insurance Society and Stromberg Carlson Telephone Manufacturing Company, under affiliation contracts having certain provisions described in the Order, as more particularly set forth in the verified Complaint filed herein, and all as more fully set forth in the affidavits of Niles Trammell, John J. Gillin, Jr. and Edward A. Hanover, annexed hereto.

[fol. 224] 2. Immediate and irreparable injury, loss and damage will result to each of the Plaintiffs, and to the prejudice of the public, by reason of said action threatened by Defendants, as described in paragraph 1 hereof and more particularly set forth in the verified Complaint filed herein and the annexed affidavits of Niles Trammell, John J. Gillin, Jr. and Edward A. Hanover.

3. If Defendants take the action threatened by them as aforesaid in paragraph 1 hereof, any judgment which this Court may later render upon final determination of this cause will be ineffective.

4. If a preliminary injunction and a temporary restraining order be granted herein, the injury, if any, to Defendants herein, if final judgment be in their favor, will be inconsiderable and will be adequately indemnified by bond.

5. No previous application has been made to any court for the relief sought herein.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a Member of the Firm, Attorneys for National Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York. Thomson, Wood and Hoffman, by John B. Dawson, a Member of the Firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York. Hill, Rivkins and Middleton, by Thomas H. Middleton, a Member of the Firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York. Goodwin, Nixon, Hargrave, Middleton & Devans, Office and P. O. Address, 31 Exchange St., Rochester, N. Y., of Counsel for Stromberg Carlson Telephone Manufacturing Company.

[fol. 225] IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF NILES TRAMMELL, PRESIDENT OF NATIONAL
BROADCASTING COMPANY, INC.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

Niles Trammell, being duly sworn, deposes and says:

I

Introduction

I am the President of National Broadcasting Company, Inc. (hereinafter called "NBC"), one of the plaintiffs herein. I am familiar with the radio broadcasting business in general and with NBC's radio broadcasting and radio network broadcasting business in particular. I have read the verified Complaint herein and I am familiar with the fact therein stated. This affidavit is made in support of Plaintiff's application for a preliminary restraining order suspending the operation, execution and enforcement of the Order described in the Complaint, and in support of the application of the Plaintiffs herein for a temporary or interlocutory injunction.

II

The Order

On May 2, 1941, the Federal Communications Commission (hereinafter called the "Commission") issued its Order in Docket No. 5060 (Exhibit D to the verified Complaint herein and hereinafter sometimes called "the original Order"). Two of the six Commissioners dissented. On October 11, 1941, the Commission (with two Commissioners dissenting) amended its Order in Docket No. 5060, and a copy of such amendment (hereinafter sometimes called "the Order on Rehearing") is Exhibit E to the verified Complaint herein. Said Order as amended (here- [fol. 226] inafter sometimes called "the Order") is summarized in paragraphs 28 to 40 of the verified Complaint,

and is hereinafter more fully described. The original Order by its terms purported to become effective with respect to then existing contracts, arrangements and understandings, or network organization station licenses, 90 days thereafter, i. e., on July 31, 1941, and purported to become effective in all other respects on May 2, 1941. On June 13, 1941, said Order was amended so as to defer its effective date with respect to the maintenance of more than one network by a single network organization until July 31, 1941. Said Order was further amended on July 22, 1941 so as to postpone its effective date until September 16, 1941 with respect to contracts, arrangements and understandings existing on May 2, 1941, and with respect to network organization station licenses and the maintenance of more than one network by a single network organization. On August 28, 1941, the effective date for the portions of said Order which were to have become effective on September 16, 1941 was changed to an indeterminate time to be fixed by the Commission on or after September 12, 1941. On October 11, 1941, the effective date of such portions of said Order was fixed at November 15, 1941; that portion of said Order dealing with the ownership of more than one network by a single network organization was indefinitely suspended, subject to being made effective upon six months notice; and certain paragraphs of the original Order were amended in substance as set forth in the Complaint filed herewith and hereinafter more fully described. The Order of the Commission, this affidavit will show, has caused serious and irreparable injury to NBC and will continue to do so unless its enforcement be restrained.

III

Description of Network Broadcasting

The radio service rendered in the United States today is dependent upon the efficient functioning of a complicated and balanced organization. The nature and extent of the injury to NBC and to the public which will result from the Commission's Order can only be explained after a brief reference to how broadcasting is conducted and financed in the United States.

[fol. 227] In contrast to Europe, where the standard pattern for radio broadcasting is a Government monopoly

paid for by a tax on receiving sets, radio broadcasting in the United States has been developed to its present high standard by private initiative subject to a minimum of Government regulation.

When radio broadcasting was beginning in this country during the early 1920's, utilization of the great technical advances made by the radio industry was endangered by the difficulty of finding a source of revenue to meet the heavy expenses of broadcasting. The problem was how to finance a day by day series of musical, cultural, educational and other programs without expense to the listening audience.

After some experimentation, this source of revenue was found in advertising. Advertisers have continued to furnish the money which today enables over 800 commercial broadcasting stations to give the American people a broadcasting service unequalled elsewhere.

The fact that radio broadcasting is financed through advertising makes it necessary that broadcasting organizations be conducted in such a manner as to compete successfully with magazines, newspapers and other media seeking advertising revenue.

The local unit for broadcasting is the standard broadcast station which, in order adequately to serve the public interest, must carry its large capital investment, pay its expenses and earn its profits from the sale of broadcasting time to advertisers or to networks. The majority of such stations have a daily broadcasting schedule of 16 to 18 hours, 7 days a week, 52 weeks a year. This schedule makes necessary a constant flow of advertising contracts, programs, program talent, a high degree of engineering skill and unending planning. Such a station will enter into a contract with an advertiser to broadcast a particular program or series of programs over its facilities and derives its income from the sale of such service.

When only one station is involved, this transaction is relatively simple, but when the transaction involves the simultaneous broadcasting of the same program on a nation-wide scale over scores of independently owned stations the matter becomes an extremely complicated one.

Nothing short of clockwork precision suffices to effect the necessary changes in the line-up of stations between the [fol. 228] end of one network program and the commencement of the next. No end of painstaking planning and ad-

vance scheduling is required to operate a broadcasting network with station lineups constantly changing to meet the requirements of advertisers and a constant flow of accurately timed programs.

Commercial and Sustaining Programs: Programs paid for or "sponsored" by advertisers are known as "commercial" programs. In addition, it is necessary for broadcast stations in the intervals between commercial programs, and at times in place of them, to schedule so-called "sustaining" programs. Sustaining programs are not paid for by any advertiser but are furnished by the station or the network. To some extent these programs were originated because of the desirability of having a continuous broadcast schedule. Another reason for the use of sustaining programs was voluntary recognition on the part of broadcasters that programs of certain types, such as religious programs, informative programs furnished by various governmental agencies and certain programs involving discussions of political principles and other controversial issues, were not suited to advertising sponsorship. The use of high types of sustaining programs also creates good will for the station and induces people to become accustomed to listen to certain stations in preference to others.

Circulation: What a station has to sell to an advertiser is "circulation", which is produced by two factors. The first is the station's coverage, which may be defined as the number of radio families (i. e., families having radio sets) which can satisfactorily hear the programs broadcast by that station. Coverage is dependent upon the power and the frequency of the station, the physical nature of the terrain surrounding the station and the number of radio families in its vicinity. There are in the United States today three national network organizations, NBC, Columbia Broadcasting System, Inc. (hereinafter called CBS) and Mutual Broadcasting System, Inc. (hereinafter called Mutual). NBC, the oldest of the three, was organized in 1926 prior to the creation of the Federal Communications Commission or its predecessor the Federal Radio Commission.

Radio Station WJZ, which NBC acquired from Radio Corporation of America, its parent company, first became the sole property of Radio Corporation of America on or about May 15, 1923.

[fol. 229] For a period of three or four years subsequent to its acquisition of Station WJZ, Radio Corporation of

America operated this station without the support of any advertising revenue whatsoever.

Radio Corporation of America as early as 1923 connected Station WGY, Schenectady, with Station WJZ by wireline, thereby making its first network broadcast. This network which subsequently developed into the present Blue network was taken over by NBC upon its organization in 1926. At that time NBC also began operating the network known as its Red network. The second factor is the popularity of the programs broadcast by the station and all of the other elements creating good will for the station.

The combination of these factors determines the number of people who will be likely to hear a particular program, i. e., circulation. When a station is affiliated with a network, its circulation is increased by reason of the good will built up over a period of years by the network organization. The great majority of stations regard their network affiliation as one of their most valuable assets.

Network Broadcasting: Network broadcasting is the simultaneous broadcasting by two or more connected radio stations of the same program.

In the usual course, a network program is staged or originated in the studios of the network organization and is transmitted to the stations on the network by means of telephone lines leased from the telephone company by the network organization. Because of the speed with which electricity travels each station on the network is enabled to broadcast the program simultaneously.

It is network broadcasting that enables nation-wide broadcasting to be effected and that reflects the national aspects of the radio industry as distinguished from those of purely local character and significance. The average local station is incapable of selling enough advertising locally to round out its broadcasting schedule with commercial or sustaining programs in any way comparable with the quality of those furnished by the national network organizations.

This conclusion is confirmed by the unanimous result of surveys of all types relied upon in the broadcasting trade indicating that the audience of a radio station with a network affiliation is greater than that of a comparable station without such affiliation.

[fol. 230] The 310 standard broadcast stations not affiliated with any network in 1938 operated at an aggregate

loss of \$149,107 in that year, 162 of them showing net incomes aggregating \$888,493 and 148 of them showing net losses aggregating \$1,037,600.

As a matter of history, nationwide network broadcasting owes its growth to the demand by standard broadcast stations for an adequate programming service, which, at least with respect to less favorably situated standard broadcast stations, is obtainable only through a national network drawing upon the great talent centers of the nation.

The development of some form of national network broadcasting was also a necessary corollary to radio's attempt to compete effectively for the advertiser's dollar—since it is a matter of common knowledge that a substantial number of American industries make standard products for national distribution and advertise such products nationally in magazines and other printed media having a national circulation.

It is this national advertising which makes possible the nation-wide network broadcasting of both commercial and sustaining programs of a higher quality than is possible with the resources of any individual station.

There are grave limitations on the type of service which an individual station can furnish. The programs originated by local stations are of necessity representative of the locality and not of the nation at large. What is more, no network which confines its broadcasts solely to such programs can do more than represent various separate localities. It cannot give the broader, more homogeneous national service necessary to the development and preservation of national unity and national culture, and to the enlightenment of the people with respect to problems affecting the nation as a whole.

The development of some form of nation-wide network broadcasting through a national organization was made inevitable by this limitation of the local broadcasting services, which could never be regarded as satisfying the need for a nationwide service.

Existing Networks and Network Organizations: NBC's Red and Blue networks were the first two networks in operation with national coverage and were pioneered by NBC at a time when there was no one else in the field with the foresight, courage and enterprise to engage in national network broadcasting. It took bold money, guts and

brains to build in a field which was then new and hazardous. NBC invited competition at the outset and, in 1927, it welcomed the organization of CBS.

Between 1927 and 1934, the pioneer years of nationwide network broadcasting, the people of the United States relied upon NBC's Red and Blue networks and the CBS network for their national radio service. This service was developed and expanded throughout the worst years of the greatest depression this country has known. The value of the public service which was rendered during those years is incalculable.

Ultimately, in 1934, the Mutual Broadcasting System was organized and it attained a national status in 1936. The three existing national network organizations, therefore, presently operate four national networks, i.e., the NBC Blue, the NBC Red, CBS and Mutual.

Each of NBC's networks renders a national radio coverage. Its ability to do so is facilitated by the fact that NBC is licensed to operate key stations for programs originated by NBC's network organization, which stations are supplemented by arrangements or contracts with independently operated radio stations enabling such programs to be broadcast over such independent stations.

The network broadcasting services rendered by NBC today are the product of fifteen years of informed experience. Its organization has been conditioned by the needs of its growing, nation-wide business. NBC has a finely attuned organization for the conduct of a business that requires the precision of split-second timing.

At present both the network and the local standard broadcasting services are furnished by broadcast stations operating upon frequencies between 550 and 1600 kilocycles. In addition to these standard broadcast services, a distinct type of service is rendered by a number of powerful international broadcast stations situated in the United States. Although these stations may be heard within the United States, their primary audiences are located outside of its boundaries, in South America and in Europe. This service is expensive and it has a peculiar value in times of national emergency such as the present, but it is not commercially self supporting. As a result, NBC and CBS have furnished their contributions to this service out of revenues derived from standard broadcast operations.

[fol. 232] Affiliation: Each of the three national network organizations owns, operates or controls relatively few stations. Out of a total of 70 stations affiliated with its Red network, 99 stations affiliated with its Blue network and 54 stations affiliated from time to time with one or the other of said networks, as of June 1, 1941, NBC owned and operated only 7 standard broadcast stations and leased and operated 3. Out of a total of 119 affiliated stations, as of June 1, 1941, Columbia owned and operated 7 standard broadcast stations and leased and operated 1. Mutual is a network organization owned in unequal proportions by a number of stockholders, each of which operates or controls a minimum of 1 standard broadcast station. As of June 1, 1941, Mutual had a total of 176 affiliates, including stockholders. In no case could the stations now owned, leased or operated by a network organization effect nation-wide broadcasting and satisfy the nation-wide needs of national advertisers.

In order to effect simultaneous nation-wide broadcasting it is necessary for the network organization to enter into arrangements with independently owned and operated standard broadcast stations throughout the country whereby network programs can be broadcast over the facilities of such stations. An independently owned station which enters into such an arrangement with the network organization is known in the trade as an "affiliate" of the network organization, and the contract embodying the arrangement is known as an "affiliation" contract.

Thus, nationwide network services reach the radio audience as a result of cooperation between a network organization operating a few key stations and a large number of independently owned and operated standard broadcast stations affiliated with such network organization.

It must be remembered that there are many affiliates associated with each network organization (there being 99 on the NBC Blue alone) and each of these affiliates is, in addition to broadcasting network programs, engaged in the business of selling time for commercial programs to local advertisers and arranging his own schedule of local sustaining programs.

The significance of the affiliation contract between station and network organization is that it expresses the terms upon which the parties can cooperate to furnish a national broadcasting service without displacing the legitimate requirements of the local broadcasting services. These af-

[fol. 233] affiliation contracts are not based upon theories or assumptions. They simply embody the-working principles that have in practice resulted in a national and local radio service which has won general public approval and which is unequalled elsewhere.

Obviously, the value to an advertiser of time on or programs to be broadcast from any single station is far less than the value to him of time and programs to be broadcast on a national network, and consequently he spends larger amounts of money for the national service and for the programs to be used thereon. This difference is reflected in the overall standard of service furnished by local stations as compared to national networks. It is also obvious that the quality of local service furnished by a powerful station in a metropolitan area varies widely from that furnished by a small station in a rural area, mainly because of the different value of the respective stations to advertisers. Network broadcasting equalizes these differences, since the small rural station and the powerful metropolitan station broadcast the same network program at the same time to the advantage of the less fortunately situated communities.

A national network raises operating problems which are infinitely more complex than those encountered in the operation of a single station. For example, national advertising involves the expenditure of large sums of money, both for station time and for program talent. Magazines and newspapers offer to such advertisers advance assurance of the circulation they desire in the markets wherein they sell throughout the period of an advertising campaign. To successfully compete with these other advertising media, the national networks must be able to offer a reasonable assurance of circulation, but in order to do so, they must be able to clear specified periods of time on many radio stations, each of which is simultaneously preparing its own schedule of local commercial and sustaining programs.

The efficiency of current broadcasting operations is traceable directly to the operation of key stations by the networks and to existing station-network affiliation contracts embodying the principles which have in practice produced our present high standard of nation-wide broadcasting services.

[f6l. 234] **Affiliation Contracts:** In most cases, NBC's contract of affiliation with independent stations provides in general that:

1. NBC will at its own expense pay for special telephone wirelines connecting the originating point of the program to the station.

2. The station grants NBC, an option to sell certain specified periods of the station's time, exercisable on 28 days' notice. This means that any one purchasing a segment of time from NBC, within the specified periods, for a program serving the public interest, convenience and necessity can be assured of full-network circulation upon 28 days notice.

3. NBC will supply the station with a full schedule of sustaining programs, without monetary payment by the station or any obligation whatever upon the station to take any of said programs.

4. As compensation for the network services rendered by NBC, including the furnishing of sustaining programs by NBC, the assumption of wireline charges and the service of selling the stations' time, NBC retains a certain portion, and pays the stations the balance, of the proceeds which it receives from advertisers for the sale of network time.

For the station, the affiliation contract is equivalent to a firm obligation to sell certain hours of its time on 28 days notice. In return, NBC must assume the expense of a wireline connection with the station, must undertake to provide suitable sustaining programs on a daily basis, and must sell enough time to national advertisers to support the entire structure.

Each of these provisions is based upon the reasonable needs of the service.

(a) **Wirelines:** When broadcast stations are connected for a network program, the connection is made, with telephone wireless which, because of the need for high fidelity transmission and the great distances involved, are extremely expensive to maintain. These connections are maintained between NBC and all of its affiliated stations throughout the broadcast day so that NBC may offer a continuous schedule of commercial and sustaining programs which will

[fol. 235] be available to affiliated stations at any time in order to supplement their local offerings.

NBC endeavors so far as is reasonably possible to undertake in each of its affiliation contracts to assume the expense of such telephone wirelines between its network organization and the station on an annual basis. On the one hand, this practice enables the stations to obtain network programs more readily because of their continuous availability. On the other, it places upon the network rather than upon the individual stations the risk, so far as wireline expense is concerned, that the network operations of the particular station will not be profitable in any given period.

The expense involved is by no means nominal. NBC's wireline expenses in 1940 aggregated in excess of \$3,600,000.

(b) *Network Optional Time*: The optional time provision is the balance wheel which regulates the cooperative efforts of the network organization and its affiliated stations in the production of a nationwide broadcasting service. It affects every aspect of the network business, including the relations between the network organizations and advertisers as well as the relations between the network organizations and affiliated stations.

As has been previously stated, the national advertiser negotiates for and buys radio time solely on a commercial basis. He will insist upon a national circulation and, if he cannot get it from the radio network, he will divert his money to newspapers, national magazines and other media, to the detriment of the radio service.

Such advertisers spend considerable sums on an advertising campaign, and there is keen competition for their business. The optional time provision in network affiliation contracts enables the network organizations to negotiate with such advertisers on the basis of an assured national coverage up to 28 days prior to the first program. It also enables the networks to enter into a contract with such advertisers as soon as the parties have agreed upon terms.

It must be remembered that NBC's Blue network, for example, has 99 affiliates, each of which is compiling daily its individual schedule of commercial and sustaining programs. Under such circumstances, there is every likelihood that NBC will find, upon investigating the possibility of scheduling a network program for a certain hour of a specific day, that a number of stations will have conflicting

[fol. 236] commitments. In the absence of network optional time, the unwillingness of a single station located in a market indispensable to an advertiser to accept a particular program would cause the advertiser to withdraw and would consequently defeat the desire of all of the other stations to carry that program.

At the present time, an advertiser using the Red network during the evening hours is required to contract for the use of a minimum of fifty stations, of which only six are operated by NBC itself. Consequently, in the absence of network optional time, each and every advertising contract negotiated for such hours on the Red network would require successful negotiation by NBC with a minimum of forty-four stations.

From the point of view of NBC's relations with advertisers, network optional time on a firm basis is a *sine qua non* of negotiation and contracting. The advertiser wants to know what he is buying before he buys it. If a tentative period of time is fixed for his program, but no contract can be entered into before forty-four or more stations have been contacted and the consent of each obtained, the advertiser may well have changed his mind. If stations refuse for any reason to clear time for the advertiser's program, he may refuse to consider a substitute period. Without optional network time, therefore, NBC must deal with advertisers on an "if, as and when" basis in competition with other media doing business on a firm basis.

From the point of view of NBC's relations with its affiliated stations, network optional time is necessary in order that the business may be conducted on a big enough scale to pay the out-of-pocket expenses thereof. As will hereinafter be more fully explained, NBC's expenses in 1940 for network and key station operations, exclusive of all international broadcasting or other non-standard broadcasting expenses, aggregate more than \$17,900,000. It is a human impossibility to obtain unanimity among the large number of necessary affiliates a sufficient number of times to carry this load.

It must be remembered that the 8½ hours governed by network optional time leave ample periods within which stations can schedule local programs, since the majority of such stations have a daily broadcasting schedule of from 16 to 18 hours. What is more, the programming of a single

[fol. 237] station operating under these optional time arrangements is infinitely simpler than the programming of a network in the absence of such provisions.

(c) *Sustaining Programs*: The sustaining programs furnished to the affiliated stations by NBC's network organization have a three-fold importance. First, they are of such quality that there is no dissent from the proposition that they serve the public interest. Second, their popularity is so great that they render a valuable service both to the network and to the affiliated stations by creating large audiences and consequent good will. Finally, the expense of supplying these programs goes far to explain the necessity for efficient network operations.

Musical sustaining programs include the Music Appreciation Hour, conducted by Walter Damroch and concerts by the leading symphonies of the country. The NBC Symphony Orchestra has been created exclusively for radio, and its programs, under the leadership of such celebrated conductors as Arturo Toscanini and Leopold Stokowski, are broadcast as sustaining features from New York. For the last twelve years, NBC has broadcast the National Farm and Home Hour in cooperation with the United States Department of Agriculture at an annual cost of \$100,000. NBC also provides a continuous nationwide news service gathered from all parts of the world.

In addition, NBC makes its facilities available to religious groups of all denominations, to radio forums such as America's Town Hall Meeting of the Air, the Chicago Round-Table and the National Radio Forum.

During 1940, NBC's aggregate schedule of network sustaining programs, involving over 35,000 broadcasts, required the expenditure of more than \$3,000,000 for talent and material alone. During the same period, NBC's other expenses for network and key station operations, such as rent, sales, wirelines, engineering, staff, etc., aggregated over \$14,900,000.

(d) *Miscellaneous Contract Provisions*: There are several provisions customary in contracts of affiliation between NBC and its independent station affiliates which are in all respects reasonable.

One example is the provision expressly allowing any affiliated station to reject a network program offered under [fol. 238] the terms of the contract if such program is not in

the public interest, convenience or necessity.' This provision leaves the station entirely free to protect its legitimate interests as a licensee bound to operate in the public interest, convenience and necessity.

Network Operation of Key Stations.—It will be recalled that each nationwide network organization, as well as operating through affiliation contracts with independently operated standard broadcast stations, itself operates several key stations for network broadcasting. NBC, having two networks, operates two stations in each of the cities of Washington, New York, Chicago and San Francisco, each of these stations being a key station in one or the other of NBC's networks.

For example, NBC operates Station WJZ in New York as a key station of the Blue network and this station was acquired by NBC in 1931. Similarly, NBC acquired Station WEAJ in New York, which it now uses as a key station for the Red network, as early as 1926.

These key stations now operated by NBC are not many in number, but they are vitally important to the efficient operation of its business of network broadcasting. They minimize operational difficulties; they serve as originating points for major programs; and they are useful as laboratories for new ideas which may later be used on the entire network. They are the focal points of network operations and without them it would be impossible to furnish the network services enjoyed by the radio audience today.

Revenue: Networks must graduate their rates to advertisers upon the basis of the circulation that they can offer, that is to say, the probability that prospective customers will be listening to network programs. Network circulation is basically the sum of the circulations of each of the stations forming the network for a particular program, so that the network's revenues will vary directly with the availability of individual stations for a particular program. Augmenting this circulation, and consequently augmenting the network's revenues, is the additional circulation caused (as is shown by surveys of all types relied upon by the broadcasting trade) by the fact that listeners will be attracted to a particular network by reason of the goodwill that the network's circulation has enabled it to build up [fol. 239] over a period of years in the broadcasting of commercial and sustaining programs of high quality.

These factors are cumulative in nature. Any change in the provisions of affiliation contracts which would inhibit the network from offering its full circulation will endanger the entire network broadcasting structure as it exists today. Any hindrance to the ability of a network to offer its full circulation as based upon the number of affiliated stations available for a particular program, or the availability of a station in any key market, will result in an inevitable spiral of injury to the economic interests of network and affiliate. This injury increases in geometric progression, because any interference which blocks off affiliated stations necessarily lowers network revenues and this, in turn, requires a curtailment of program service which, in turn, further decreases the revenue to be received by the network and its affiliates.

IV

Injury Resulting From the Order

Impact of Order: The Order of the Commission, insofar as it purports to become effective on or before November 15, 1941, impacts network broadcasting at two vital points:

First: It requires an immediate revision of the contractual arrangements between individual standard broadcast stations and network organizations in a way which will make adequate nation-wide network broadcasting impossible; and

Second: It prohibits (a) ownership by a network organization of more than one station in any given locality, and (b) the ownership by a network organization of one of a few stations, or the most desirable station in a given locality.

Option Time: At present NBC is able to sell network time for commercial programs to national advertisers on the basis of an assured national circulation for specified hours of the day by giving its affiliated stations 28 days advance notice. NBC's ability to do this is basically dependent upon the time option provision in its contracts with affiliated stations, as hereinabove described, which enables NBC to sell network programs within the optional [fol. 240] time period and enables the affiliated station to use the balance of the day for such local programs as it sees fit.

As originally promulgated on May 2, 1941, paragraph 3.104 of the Commission's Order, as stated in the verified Complaint herein, prohibited the inclusion of any optional time provision in any contract of affiliation between a network organization and a standard broadcast station. As amended on October 11, 1941, said paragraph, as stated in said Complaint, prohibits the inclusion of an optional time provision in any contract of affiliation valid as against any other network organization, national or regional. Said paragraph, as amended, moreover, prohibits a station from agreeing to clear its time of non-network programs for NBC upon less than 56 days notice. The same paragraph prohibits any option provision in any such contract which may "prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

Said paragraph 3.104 divides the broadcast day into four segments (8 A. M. to 1 P. M.; 1 P. M. to 6 P. M.; 6 P. M. to 11 P. M.; 11 P. M. to 8 A. M.) and permits a station to agree to clear time of non-network commitments upon 56 days notice, so long as the time subject to call on this so-called "option" does not exceed a total of three hours within each of said four segments.

The effect of the amended paragraph 3.104, like that of the original, will be destructive of nationwide network broadcasting, to the detriment of the other radio services supported thereby. The vice of this amended paragraph is its failure to recognize that national network organizations must be able to clear time on affiliated stations in order to render a nation-wide service and that the identity or character of the organization which interferes with such clearance is immaterial. In addition to NBC there are at present two nation-wide networks, one operated by Columbia Broadcasting System, Inc. and the other by Mutual Broadcasting System, Inc., as well as a number of regional networks, and each of these networks, whether national or regional, will be able to block an NBC network program under the amended Order.

In operating under the Order, NBC would be forced to negotiate a sale of network time to a national advertiser, for example, on the Blue network upon an "if, as and [fol. 241] when" basis with respect to each of the 99 affiliated stations until all of the stations indicated that the

particular time desired by the advertiser would be available.

National network advertising contracts are customarily entered into for a period of one year, subject to the right of the advertiser to cancel at the end of any thirteen-week period. Under the Commission's Order, before NBC could agree to enter into an advertising contract with an advertiser for a commercial program, it would first have to communicate with each station to determine whether such station had available the particular period of time desired.

At the present time an advertiser using the Red network during the valuable evening hours is required to contract for the use of a minimum of fifty stations, of which only six are operated by NBC itself. Consequently, if optional time is prohibited, each and every advertising contract negotiated for such hours on the Red network would require negotiation by NBC with a minimum of 44 stations. In the normal course of its business, each of these stations would, under the Commission's amended Order, be scheduling the programs of other networks. Despite these conflicting demands, therefore, NBC would have to obtain the unanimous consent of not less than 44 persons, firms and corporations for each program scheduled.

This problem is intensified in cases where the advertiser desires a line-up of 100 stations or more. The further fact must be considered that clearance must be accomplished for each of the many network programs broadcast. In order to save itself and its affiliated stations from damage, NBC would have to accomplish this feat a sufficient number of times annually to assure itself of a gross income of more than \$17,900,000, which amount is spent in maintaining NBC's network and key station broadcasting services inclusive of wirelines.

Optional time is as necessary for the practical operation of network broadcasting as traffic lights are for the practical flow of vehicular traffic. The Order is no more workable than an ordinance permitting each vehicle to operate the traffic lights to suit its own convenience, and the same chaos will result from its enforcement.

Elimination of network optional time on a firm basis under the Order of the Commission will cause irreparable [fol. 242] injury to NBC and its affiliated stations by making it financially and physically impossible to handle a sufficient volume of business to support the existing programs of the

network organization. Abolition of such optional time will inevitably lead to increased expenses to NBC and its affiliated stations as well as a reduction in network revenue and a consequent diminution in the quality of programs, thus setting in motion a vicious descending spiral. Such injury will result from the Commission's Order even though NBC and its affiliated stations take no action other than to amend their respective affiliation contracts so as to bring them into conformity with the Commission's Order.

The requirement that the station may agree to clear its time of non-network programs only upon 56 days notice will have the practical effect of an absolute prohibition against network optional time. It is a matter of common knowledge in the advertising business that national advertisers insist that a specific advertising program be placed before the public shortly after the contract is signed. This insistence is not peculiar to radio advertisers. For example, magazines having a national circulation have found it necessary to shorten the period between the deadline for advertising copy and publication.

The 28-day notice required in existing option time provisions was not determined theoretically, but is the result of an experienced balancing of the needs of the stations and needs of the advertisers, since the networks must satisfy the legitimate needs of both in order to exist. The 56-day period flagrantly disregards the practical necessities of the advertising business. National network organizations will have to satisfy the advertisers by clearing time on less than 56 days notice under penalty of losing to competitive advertising media the revenues which support the existing broadcasting services. As a result, NBC will have to negotiate for time on its affiliated stations on the basis of the 28-day notice period which has resulted from experience and in so doing will be unable to clear such time as against local commercial programs, local sustaining programs and other non-network programs, any one of which may defeat the scheduling of a network program.

The inevitable consequence will be the destruction of nation-wide network broadcasting to the irreparable injury of NBC.

[fol. 243] **Threatened License Revocations:** In effect the Order requires, and has been construed by the Chairman of the Commission as requiring, the amendment of contracts immediately upon the date that it purportedly becomes ef-

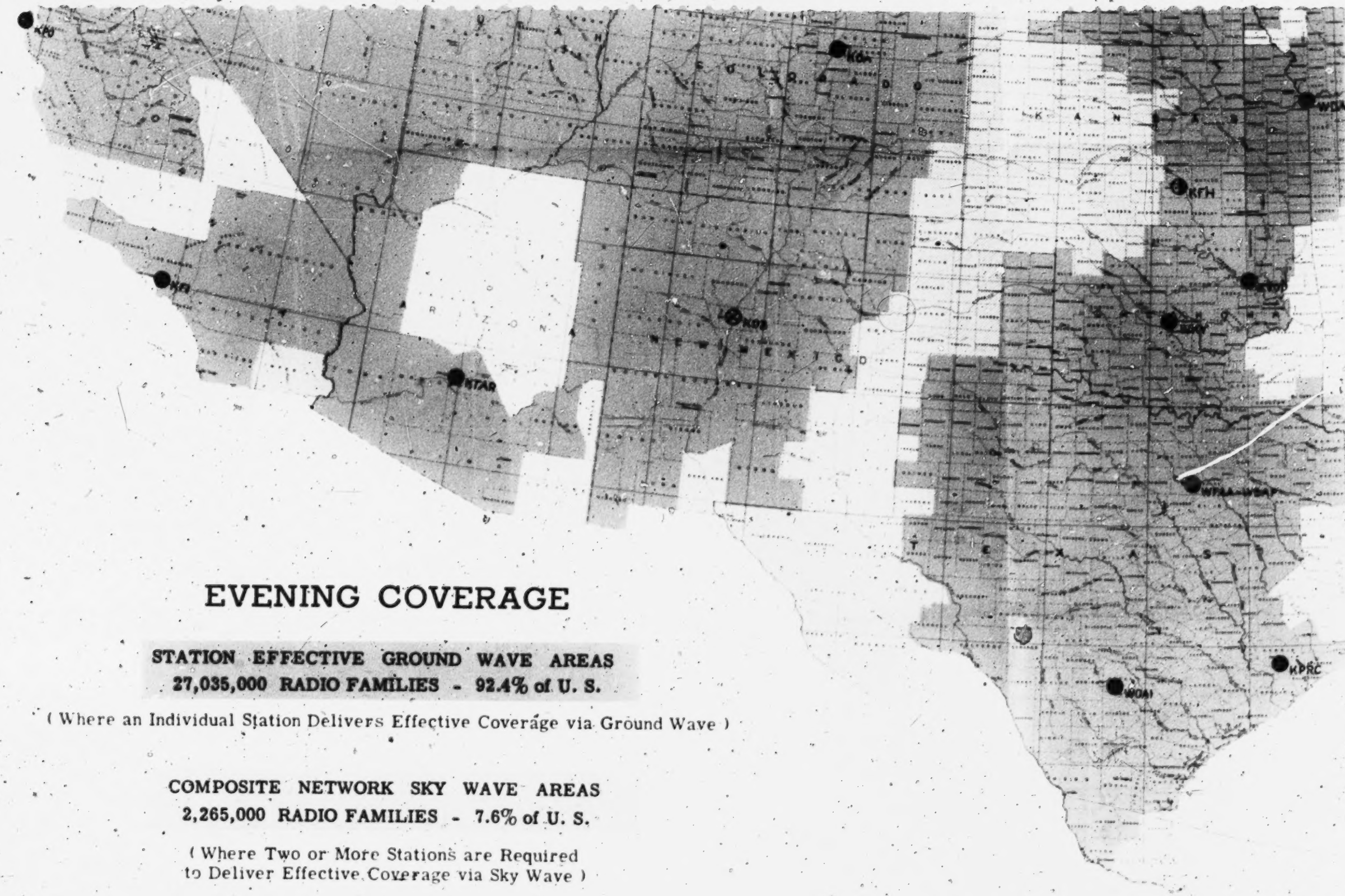
fective with respect to existing contracts, arrangements and understandings, inasmuch as the Commission in its Report (Exhibit D attached to the verified Complaint herein) has expressly stated that operation by a station under an affiliation contract containing prohibited provisions is not operation "in the public interest". Since the Commission in considering applications for renewal of the licenses of standard broadcast stations concededly weighs evidence of each act of the station during the preceding licensing period deemed by it not to have been in the public interest, many of said stations will be impelled to discontinue operation under the prohibited contract provisions immediately upon the effective date of the Order. On June 2, 1941, moreover, Chairman Fly of the Commission, appearing officially on behalf of the majority of the Commission before the Committee on Interstate Commerce of the United States Senate, stated that the Commission would issue an order revoking the license of any station which retained an affiliation contract containing the prohibited provisions beyond the effective date of the Order.

Contract Cancellations: Between May 2, 1941 and the date hereof not less than 24 standard broadcast stations having effective contracts of affiliation with NBC containing one or more contract provisions described in paragraphs 28 through 35, inclusive, of the verified Complaint herein have served upon NBC notice of cancellation of their respective affiliation contracts and such action has been taken by such affiliated stations as a direct result of the Commission's Order, as stated in the respective notices of cancellation. In addition, not less than 24 other stations having effective contracts of affiliation with NBC containing such contract provisions have served notice that such stations do not intend to abide by the terms of such contracts unless such terms are conformed to the Order of the Commission. Furthermore, NBC knows of a substantial number of additional stations which, unless the Order is complied with, intend to terminate such contracts upon the effective date of the Order. NBC has and will continue to [fol. 244] suffer irreparable injury as a result thereof, for reasons which are evident from the facts hereinabove stated.

Interference with New Affiliations: Between May 2, 1941 and the date hereof a number of independently owned and operated radio stations not affiliated with NBC have informed NBC of their desire to enter into an affiliation

EXHIBIT I

WORK POSSIBLE AFTER AUGUST 1
STATIONS



EVENING COVERAGE

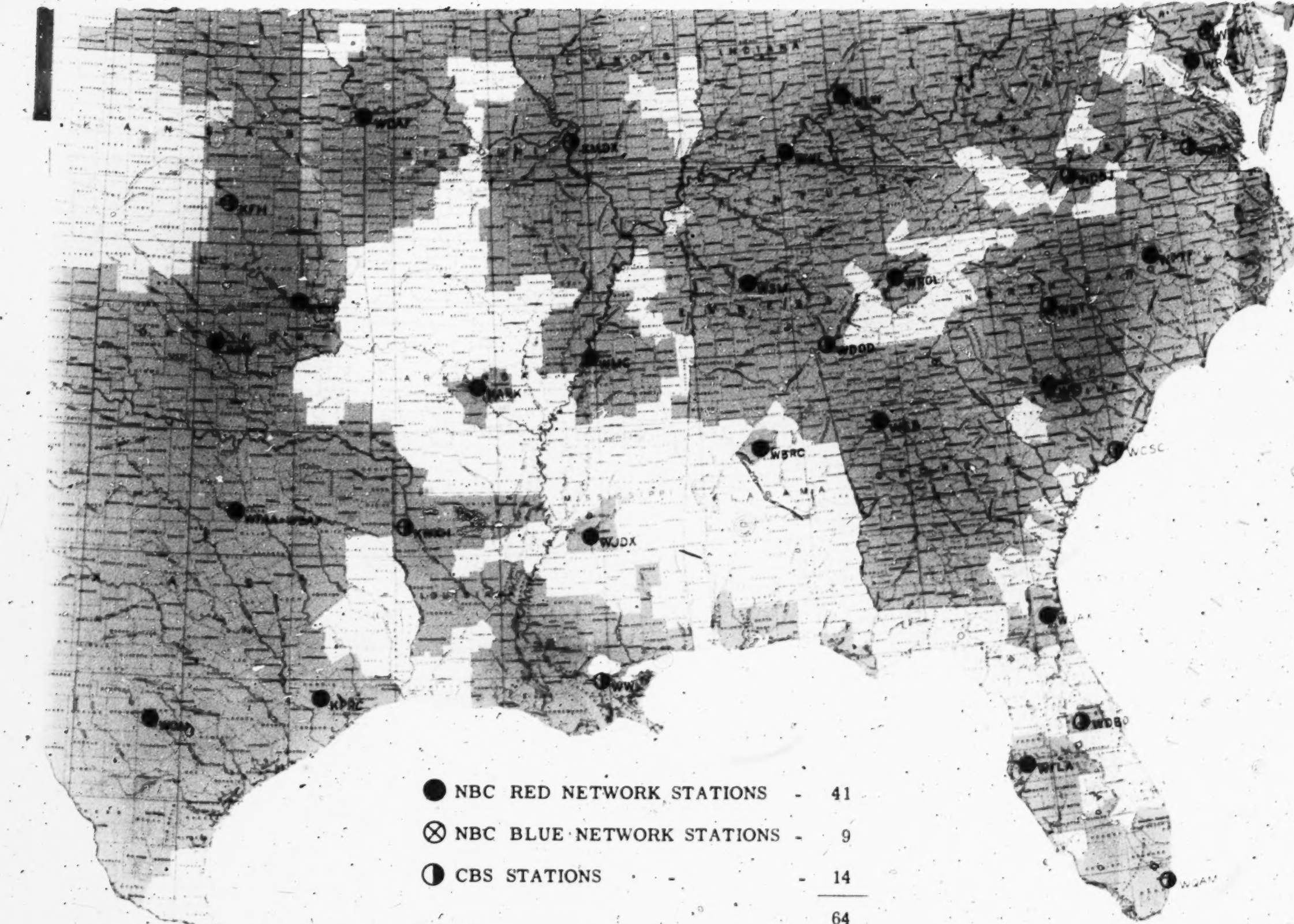
STATION EFFECTIVE GROUND WAVE AREAS
27,035,000 RADIO FAMILIES - 92.4% of U. S.

(Where an Individual Station Delivers Effective Coverage via Ground Wave)

COMPOSITE NETWORK SKY WAVE AREAS
2,265,000 RADIO FAMILIES - 7.6% of U. S.

(Where Two or More Stations are Required
to Deliver Effective Coverage via Sky Wave)

Source: NBC All-County Survey of Station Listening Habits, February, 1941
Radio Family Figures Based on 1941 Estimates



- NBC RED NETWORK STATIONS - 41
- ⊗ NBC BLUE NETWORK STATIONS - 9
- CBS STATIONS - 14
- 64

COST PER EVENING HALF-HOUR - \$12,015.00

contract with NBC containing among other things many of the provisions prohibited by the Order of the Commission. As a result of its inability to enter into such affiliation contracts NBC has been directly injured. In a few isolated instances since May 2, 1941 new and relatively unimportant stations have been added to NBC's network, without contracts of the prohibited sort, on a temporary basis pending the ultimate disposition of the matter at issue.

In the normal course of NBC's network broadcasting business certain contracts of affiliation lapse or are terminated by mutual consent of the parties thereto for a variety of reasons. In such normal course of business, moreover, NBC enters from time to time into new contracts of affiliation with different independent radio stations. As a result, in so far as the exigencies of business permit, the aggregate number of affiliated stations does not decrease and may, and has, in the past, continued to increase despite the lapse or termination of contracts as aforesaid.

There is a direct relation between the net profits of NBC and those of its affiliated stations and the number of independent radio stations affiliated with NBC. Any factor which causes a diminution in the aggregate number of such affiliated stations, such as the Order of the Commission, damages NBC and each independent broadcast station affiliated with NBC.

Diminution of Income: A number of present NBC advertisers as well as prospective NBC advertisers to whom NBC has offered to renew existing contracts or has offered new contracts for the broadcasting of commercial programs have refused to enter into said contracts upon the ground that NBC would, under the Order, be unable to assure said advertisers of the continued availability of stations presently affiliated with NBC throughout the term of said proposed advertising contracts.

[fol. 245]. **Prohibition Against Network Ownership of Stations:** Paragraph 3.106 of the Order of the Commission requires any network organization (a) to dispose of any standard broadcast station in excess of one where any two or more stations operated by said network cover substantially the same service area; and (b) to dispose of any standard broadcast station where such station is the only, or is the most desirable, station in a given locality. As a direct result of this paragraph of the Order, NBC would

have to dispose of one of the two stations now operated by it in New York, Chicago, Washington and San Francisco. With respect to stations operated by NBC in Cleveland and Denver, the position of the Commission is expressed in the following quotation from page 68 of the Report accompanying said Order of the Commission: "In Cleveland, a most important radio market, the only broadcasting facilities are one clear-channel station (owned by NBC), two full-time regionals, and one part-time regional. Charlotte, N. C., has but two stations, one of which is a 50,000-watt station owned by CBS. It seems clear that no network ownership whatsoever should be allowed in either of these cities. In several other cities, such as Denver (NBC), Minneapolis (CBS), and Washington (NBC and CBS), the available facilities are somewhat more plentiful, but the disparity among the facilities raises serious doubts whether any network ownership should be permitted."

NBC's network operations are conducted over two groups of broadcast stations which are commonly known as the "Red" and "Blue" networks. NBC in 1926 began operation of both its Red network and the network that later became the Blue network. In broadcasting radio programs, the Red network and the Blue network generally operate separately, one program being broadcast from the stations on the Red network while a different program is simultaneously broadcast from the stations on the Blue network, although, in exceptional cases, the Red and Blue networks may be combined to broadcast the same program. Each of these networks is national in scope and there is a substantial overlap in the territories served by them as well as the territories served by the individual stations affiliated with the Red and Blue networks, respectively. NBC itself operates, in all, ten radio stations and these stations are divided between the Red and Blue networks in the following manner: (The stations are owned by NBC except as otherwise indicated.)

Red Network	Location	Blue Network
WEAF	New York, N. Y.	WJZ
WMAQ	Chicago, Ill.	WENR
WRC	Washington, D. C.	WMAL (Leased)
KPO	San Francisco, Cal.	KGO (Leased)
KOA (Leased)	Denver, Colo.	—
WTAM	Cleveland, Ohio	—

NBC, like each of the other nationwide networks operated in the United States today, uses stations operated by the network organization itself in key markets as a nucleus for network operations, a practice of long standing. For example, NBC operates Station WJZ in New York as a key station of the Blue network, and this station was acquired by NBC from Radio Corporation of America in 1931. RCA became sole owner of said station on or about May 15, 1923, and had used the same as the key station for network broadcasting beginning as early as December, 1923. Similarly, NBC acquired Station WEAJ in New York, which it now uses as a key station for the Red network, as early as 1926.

The key stations now operated by NBC are not many in number but they are vitally important to the efficient operation of its business of network broadcasting. They minimize operational difficulties; they serve as originating points for major programs; and they are useful as laboratories for new ideas which may later be used on the entire network. They are the focal points of network operations and without them it will be impossible to furnish the network services enjoyed by the radio audience today.

¶ The Order, in so far as it deals with the operation of two stations or the best station in a particular locality by a network organization, will compel NBC to dispose of stations without regard to this vital factor of network operations and will necessarily have a destructive effect upon NBC's business, all to its great damage and the damage of its affiliated stations. NBC will also be injured by paragraph 3.106 of the Order by loss of revenues and good will which will result from its inability to furnish, without greatly increased expense, facilities for broadcasting from the [fol. 247] point of origin outstanding commercial programs and sustaining programs of all types.

For example, the vast majority of the talks broadcast over NBC's networks by members of Congress and representatives of the executive branch of the government originate in one of NBC's two Washington stations.

NBC will also be damaged by this paragraph by loss of value incident to a forced sale and by destruction of value incident to NBC's inability to dispose of a leased station because of lack of provision for assignment in the lease.

V

Effect of order is contrary to public interest, convenience and necessity.

The facts hereinabove stated with respect to the basic requirements for the operation of a nation-wide system of network broadcasting which uses the same stations that are engaged in furnishing a local broadcasting service make the conclusion inescapable that the Order will bring about a situation in broadcasting in the United States which is so patently contrary to the public interest, convenience and necessity as to make its issuance an arbitrary and capricious act of the Commission.

It has been made plain that broadcasting in the United States today is supported by the dollars received from national and local advertisers. Inasmuch as the advertising dollar is used to sustain this system of broadcasting, the advertiser is largely influential in determining the distribution or line-up of stations on commercial programs. General Foods for its Jello program may require a different line-up of stations from those that General Foods may require for its Maxwell House Coffee program, and the stations required by the Packard Motor Car Company differ radically from those demanded by Colgate-Palmolive-Peet. Each advertiser, within requirements set by the networks, attempts to custom-build his network to his own needs.

Minimum Requirements: Although the advertiser is thus in a position of significant influence in the choice of stations which will carry his program, his choice must today be made within the confines of certain restrictions which the networks through experience have found it advisable to [fol. 248] establish. One such restriction is a requirement that a network advertiser purchase not less than a fixed minimum number of stations. This requirement has been largely instrumental in insuring national coverage of radio programs.

An illustration of such minimum requirements is the fact that ten years ago an advertiser could purchase during the evening hours as few as ten stations on the NBC Red network for his program. Some years later this minimum requirement was increased to 23 stations and today, during the important evening hours, it is necessary for an adver-

tiser to buy a minimum of 50 stations on NBC's Red network.

Effect of Minimum Requirements: The establishment of minimum station requirements for network broadcasting has been adopted at least in part by all of the national networks operating today and these requirements have served the public interest in four respects:

First, they have enabled the networks to give the United States a truly nation-wide radio service.

Second, they have enabled more stations better to serve more people in their communities with outstanding radio entertainment.

Third, they have enabled the networks to give their respective affiliated stations, particularly the smaller ones, more hours of outstanding programs and more dollars of commercial revenue.

Fourth, they have produced increased revenue for the networks, not only for profit but for investment in more and better sustaining and public service programs and for research and development of new services (such as television) on which NBC has already spent several millions of dollars.

In addition to the establishment of these minimum requirements, the network, with its sales organization, acts as network sales agent for each of its affiliated stations. In conjunction with each and every commercial account the network sales organization does everything in its power to convince the advertiser that it is profitable for him to employ a maximum number of stations in his line-up in excess of the network's minimum requirements.

The Order of the Commission makes it practically impossible for NBC and the other networks to continue to [fol. 249] maintain their respective minimum station requirements, and thus damages both the public and the stations. In place of the existing arrangements, the Order will substitute a system favoring the large stations and the large advertisers, for it is fallacious to assume that the stations and the networks can operate as they have when the Order of the Commission becomes effective.

Advertising Super-Network: The large national advertiser is, as a matter of experience, thoroughly familiar with the coverage and popularity of practically every station in

the United States. Such advertiser desires to purchase the best network—that is to say, the network that will give him the greatest audience at the lowest cost—and he will be enabled by the Order to put together a network line-up heretofore unavailable by selecting the best stations, and only the best stations, from all networks.

Thus, an advertiser can approach NBC under the Order and insist upon buying a network which consists not of NBC stations alone, but one built up of the best stations of the NBC Red, the NBC Blue, the Columbia and the Mutual networks. If NBC should decline to act as sales agent for the deal, there is nothing to prevent the advertiser or his agency from negotiating directly with the stations, contracting for telephone wirelines and establishing his own network for his program.

Attached hereto as Exhibit I, and by reference made a part hereof as fully as if set forth herein, is a map of a 64-station network (hereinafter referred to as the "No. 1 Advertiser Network") built up in the manner described above, which network will be available to national advertisers under the Order of the Commission. This network does not show a theoretical line-up of stations, but represents the stations selected by a well-known advertising expert as typifying what he would like to purchase for his clients when enabled to do so under the Commission's Order.

This No. 1 Advertiser Network of 64 stations affords excellent coverage of 92.4% of the radio families in the United States, and good coverage of all of the remainder of such families.

Upon the assumption that the No. 1 Advertiser Network is used by an advertiser from 9 to 9:30 o'clock on a Monday evening, Exhibit II hereto attached, and included herein by reference as fully as if set forth herein, illustrates the network which it will be necessary for a second advertiser to buy even to approximate the coverage achieved by his competitor who bought time on network No. 1. Such a second advertiser would be required to include 160 stations and would obtain excellent coverage of only 76.4% of the radio families in the United States and good coverage of an additional 7.7% of such families.

Exhibit III attached hereto, and by reference made a part hereof as fully as if set forth herein, is a map showing the stations available to any third advertiser who

might desire to go on the air at the same time Monday night as the advertisers who bought time on networks No. 1 and No. 2. Regardless of the number of stations this third advertiser might desire to buy or even the amount of money that he might be willing to spend, it would be impossible for him to acquire any network line-up which would give him a national coverage equal to that of his competitors. The best remaining network line-up possible would necessitate the use of 191 stations and would provide excellent coverage of a mere 65% of the radio families in the United States and good coverage of an additional 2.2% of such families.

The Commission on October 11, 1941 amended paragraph 3.102 of the Order so as to permit a provision in affiliation contracts giving the station "first call" on the programs of a particular network organization. This was intended, as is shown by the Commission's Supplemental Report (Exhibit E to the verified Complaint herein) to obviate objections to the original Order along the lines indicated above. It does nothing of the sort. As is evident from the foregoing facts, the growth of advertisers' super-networks will be due not to the stations' inability to obtain network programs, but to the networks' inability to obtain first call on the time of their affiliated stations and the amendment completely fails to remedy this defect in the Order.

Cost of Coverage: That the above-mentioned facts are by no means hypothetical and that a situation of the type above described will result from the Order of the Commission is clearly shown by the fact that the above-described No. 1 Advertiser Network, despite its unprecedented coverage, will cost the advertiser less than the present NBC Red Network or the present Columbia network or the No. 2 or No. 3 Advertiser Network. No. 2 Advertiser Network, with less coverage, moreover; not only will cost more than [fol. 251] the present NBC Red or Columbia networks, but it will cost more than the super-network No. 1.

Effect on Public Interest: Truly national coverage under the Commission's Order will become the opportunity of a relatively few major advertisers, and the bulk of the advertising revenue of the United States will go to a relatively few of the country's major stations. There will be only one rather than four national radio networks worthy of the name and this result is obviously contrary to the public interest, convenience and necessity.

VII

Summary

The nationwide network broadcasting services enjoyed by the United States today are the fruit of fifteen years of hard work and far-sighted development by everybody connected with the broadcasting industry. Without governmental subsidies, in the face of a shattering depression and despite an unusually high rate of obsolescence, the broadcasters risked their money and used their brains with the result that this nation has a network broadcasting service which is unequalled in any other country of the world and which represents a national asset of incalculable value in a time of emergency.

There is scarcely an industry in this country today which can point to a record as clean as that of the broadcasting industry. Its organization and business practices have never been kept secret and the very contracts to which the Commission now objects have been on file with the Commission ever since they were entered into. Year after year the operation of the NBC networks has been certified as being in the public interest by the issuance and renewal of hundreds of station licenses by two Commissions.

Now, on the basis of armchair theories, over the vigorous dissent of two of its members, a majority of the present Commission would destroy the structure supporting American radio. There was no sensational discovery in the Commission's three-year study of network broadcasting to justify this wrecking operation. The Commission was only able to criticize isolated incidents so few in number as to add to, rather than to detract from, the character of the broadcasters.

[fol. 252] The Commission's ban upon firm option time represents a refusal to take account of the practical necessities of network broadcasting even as recognized by the Commission itself. The sum and substance of NBC's position as to the effect of the Order forbidding the networks to obtain firm options on station time is succinctly expressed in the words of the Commission majority, as contained in the Report of May 2, 1941:

"Few sponsors are willing to spend large sums in building up a program series to be broadcast over a definite number of stations at a certain hour if some of the impor-

tant stations are subject to withdrawal upon order of a dominant network."

Withdrawal or refusal, upon order of a "dominant" network, upon order of any network or upon order of a local sponsor, as pointed out above, the vital issue is that time must be cleared on not more than 28 days notice if network broadcasting is to be supported by the advertisers. The effect of the loss of advertising revenues upon network broadcasting services will be direct and disastrous.

The Commission also proposes to compel NBC to dispose of the key stations which are vital to its network operations and which are renowned for the quality of the service they furnish. The quality of the service rendered by these stations has largely been due to their operation by NBC, and their forced disposal will not only damage NBC but will also work to the prejudice of the interests of the listening public.

The Commission's pious expressions of horror at the "monopolistic" tendencies of four vigorously competing national networks, rendering a valuable and laudable service, raise serious questions as to its understanding of the whole problem of broadcasting when placed beside the plain fact that its Order will create a complete monopoly by a single super-network capable of stifling all competition.

It is plain from the facts hereinabove stated that NBC has suffered and will continue to suffer irreparable injury as the direct result of the Commission's Order unless enforcement of the same be restrained. On the other hand, the Commission has plainly conceded that continuance of the *status quo* pending a final court determination on the issues raised by NBC in this proceeding will not be inimical to the public interest.

[fol. 253] The Commission's Order was first issued on May 2, 1941 and in so far as it deals with existing contracts and station ownership, the effective date thereof has been postponed by the Commission itself for a period of over six months. If the public interest has not been injured by such temporizing by the Commission, it can scarcely be contended that any vital interest will suffer as a result of a stay pending a hearing in this proceeding.

Furthermore, when Chairman Fly of the Commission appeared on behalf of the majority of the Commission be-

fore the Committee on Interstate Commerce of the United States Senate on June 2, 3 and 4, 1941, Chairman Fly several times stated in effect that the Commission would be willing to have broadcast stations continue operations under existing conditions pending a court determination of the power of the Commission. For example, on June 3, 1941 Senator Clark of Idaho asked Chairman Fly:

"If the broadcasting chains that feel themselves aggrieved by your regulations should decide to go into court and test out the question of jurisdiction, or whatever other question might be permissible, I take it from your statement that as long as the court proceeding was undetermined you would not press the matter, even though an injunction or something of the kind might not be obtained from the court. In other words, you would not undertake to force the doing of something that could not reasonably be done within that limit [the original 90 day postponement of the effective date] in the interest of the industry. Do I make myself clear?"

In answer to this question Mr. Fly stated:

"Yes; I think you are clear".

and then went on to a different matter.

Niles Trammell.

Subscribed and sworn to before me this 30th day of October, 1941. Florence E. Marger, Notary Public. Queens Co. No. 2625, Reg. No. 6868. Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369. Commission Expires March 30, 1943. (Seal.)

EVENING COVERAGE

(Where an Individual Station Delivers Effective Coverage via Ground Wave)

COMPOSITE NETWORK SKY WAVE AREAS
2,372,000 RADIO FAMILIES - 7.7% of U. S.

(Where Two or More Stations are Required
 to Deliver Effective Coverage via Sky Wave)

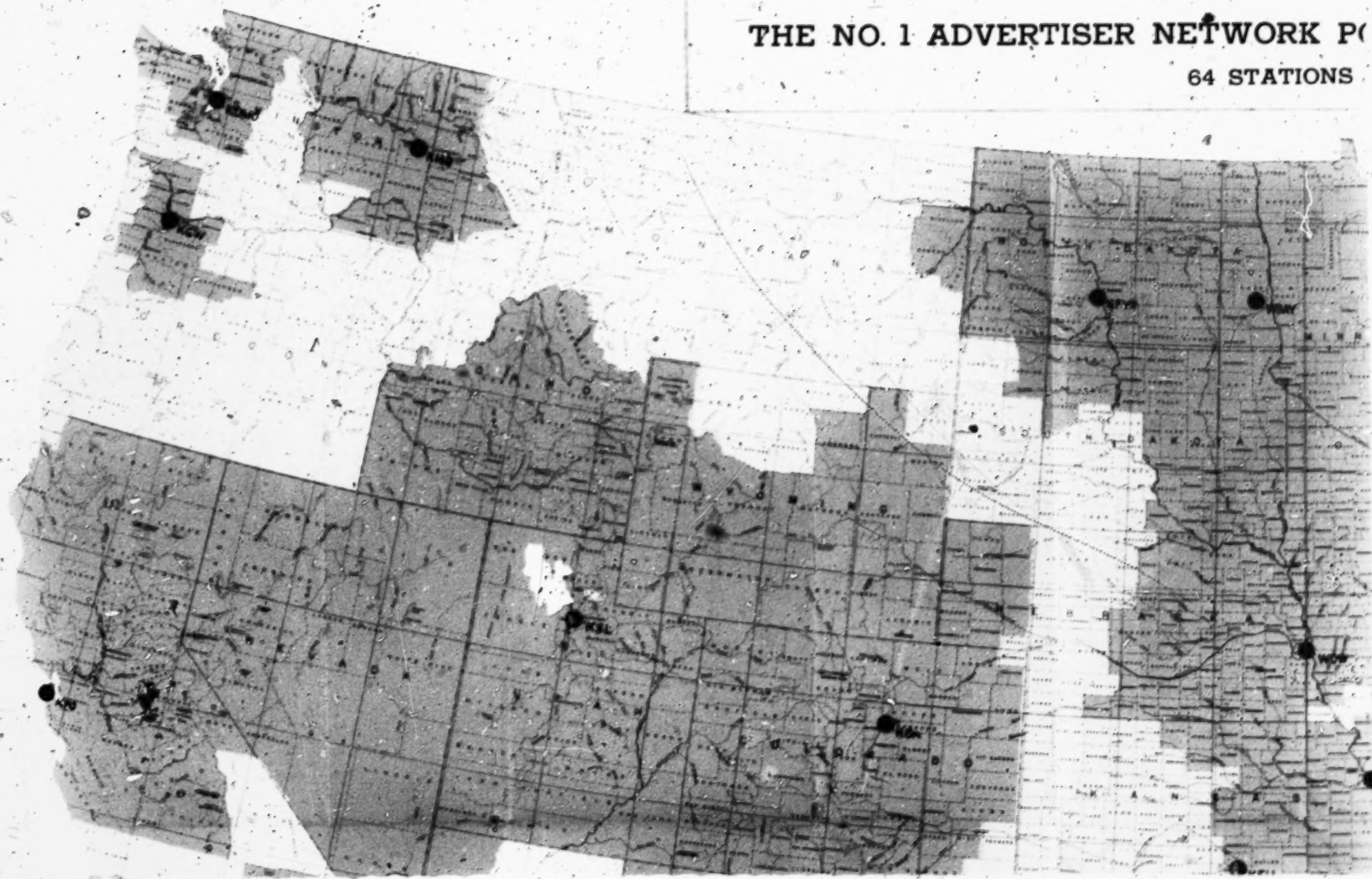
● NBC RED NETWORK STATIONS	- 35
⊗ NBC BLUE NETWORK STATIONS	- 27
⊙ CBS STATIONS	- 69
⊙ MUTUAL STATIONS	- 18
⊖ INDEPENDENT	- 11
	160

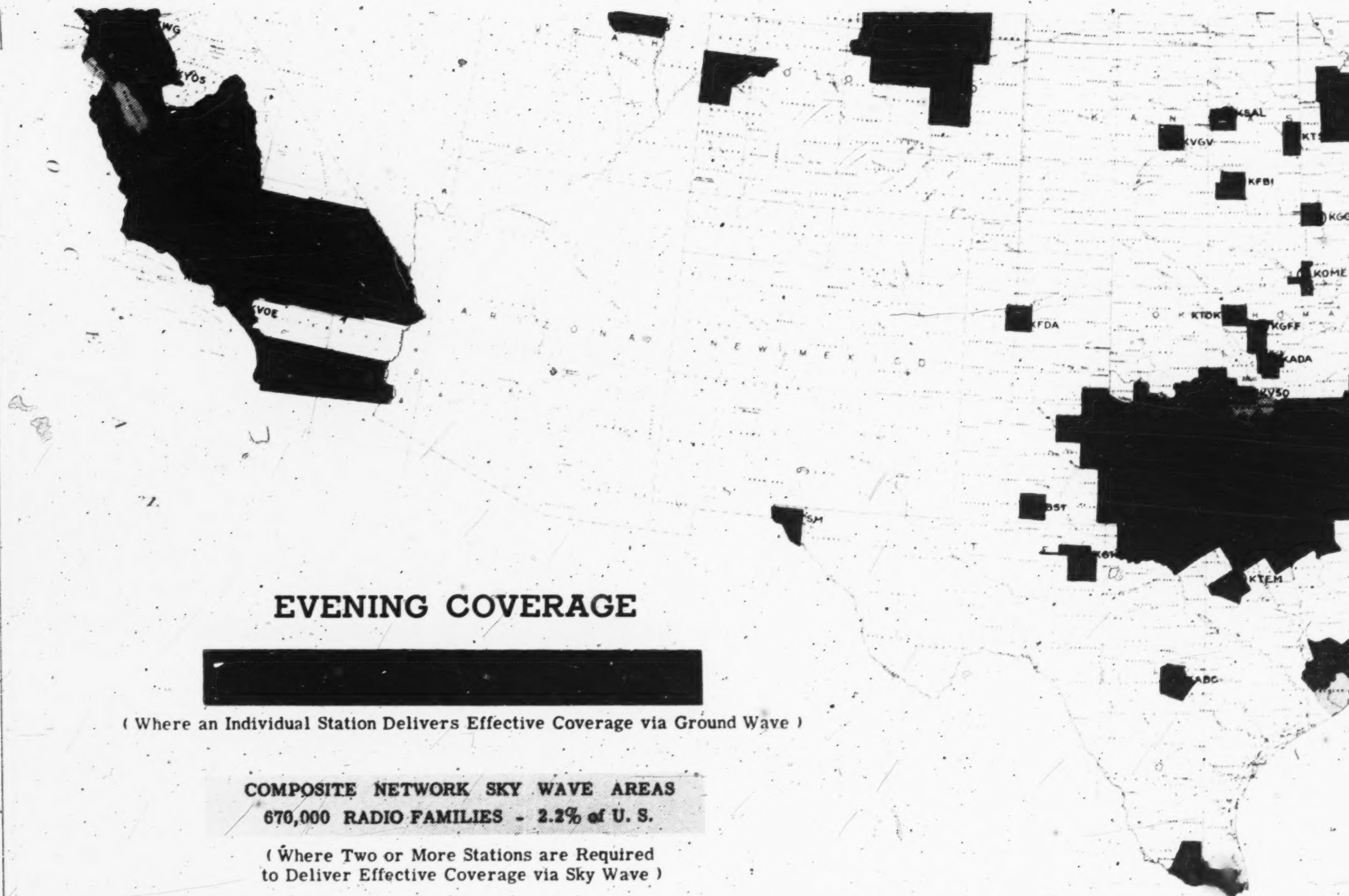
COST PER EVENING HALF-HOUR — \$14,788.00

Here follow 3 maps, Exhibits I, J, K

EXHIBIT I

THE NO. 1 ADVERTISER NETWORK P
64 STATIONS





EVENING COVERAGE

(Where an Individual Station Delivers Effective Coverage via Ground Wave)

COMPOSITE NETWORK SKY WAVE AREAS
670,000 RADIO FAMILIES - 2.2% of U. S.

(Where Two or More Stations are Required
to Deliver Effective Coverage via Sky Wave)

EXHIBIT J

THE NO. 2 ADVERTISER NETWORK PO.
160 STATIONS

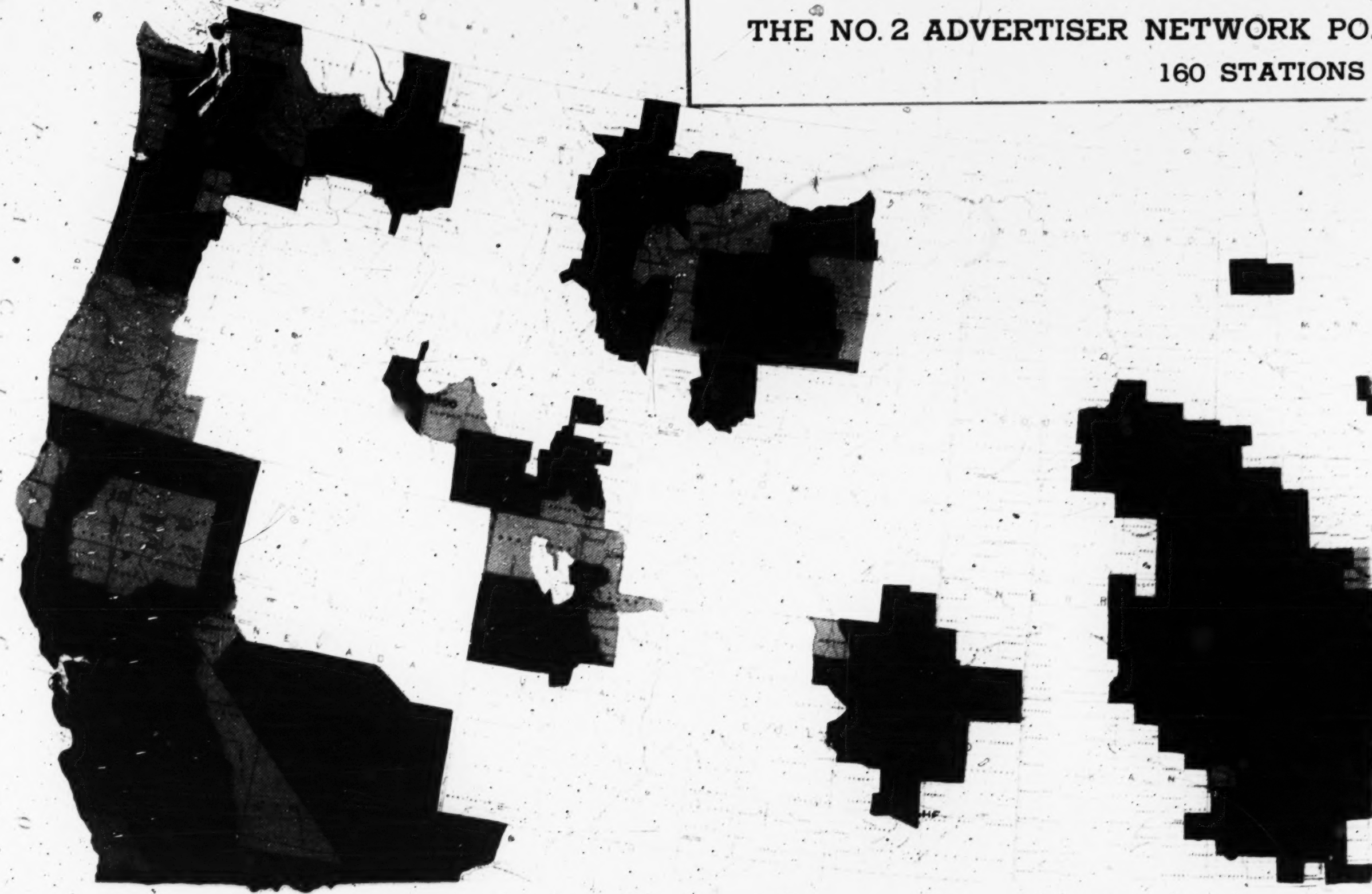


EXHIBIT J

NETWORK POSSIBLE AFTER AUGUST 1
0 STATIONS



EXHIBIT K

THE NO. 3 ADVERTISER NETWORK POS
191 STATIONS

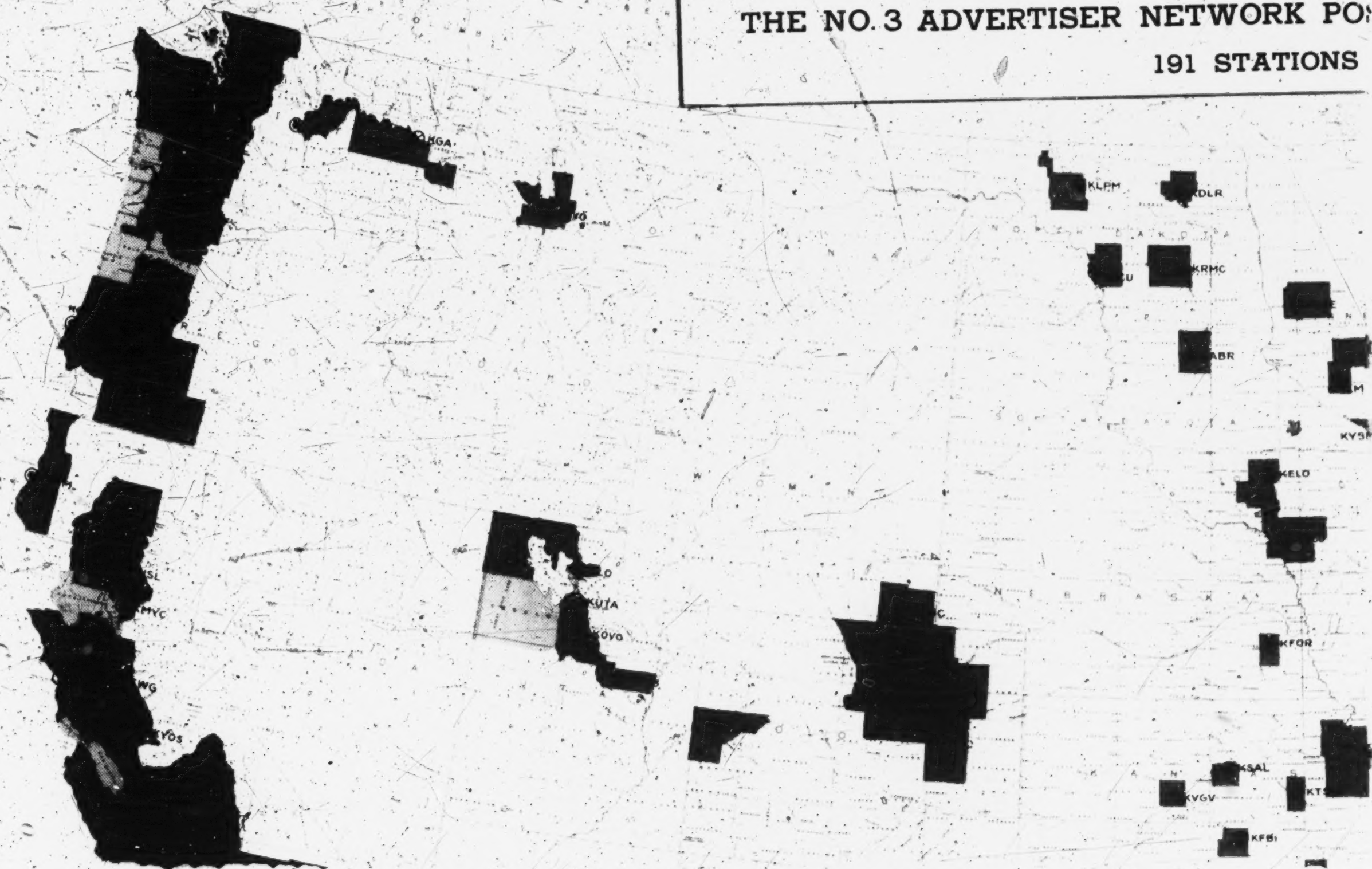


EXHIBIT K

NETWORK POSSIBLE AFTER AUGUST 1
1. STATIONS



[fol. 254] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF JOHN J. GILLIN, JR.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

John J. Gillin, Jr., being first duly sworn, deposes and says:

1. I am the General Manager of station WOW, owned by Woodmen of the World Life Insurance Society, one of the Plaintiffs herein. I have read the verified complaint herein and I am familiar with the facts therein stated and know the same to be true except as to matters stated on information and belief, and as to such matters, I believe the same to be true. This affidavit is made in support of the application of the Plaintiffs in this action for a temporary injunction and for a preliminary restraining order as prayed for in the Complaint herein.

2. The Woodmen of the World Life Insurance Society is a corporation organized and existing under the laws of the State of Nebraska, having its principal office in the City of Omaha, in said State and licensed to transact its corporate business in the States of Nebraska and New York. The Woodmen of the World Life Insurance Society owns and operates under a license from the Federal Communications Commission, and has owned and continuously operated since April 2, 1923, a standard broadcast station, known as WOW, which station is located in the City of Omaha, Nebraska. Successive renewals of the license to operate station WOW were issued to the Society by the Federal Radio Commission after its creation in 1927, and by the Federal Communications Commission since its creation in 1934, upon findings, as required by statute, that the public interest, convenience or necessity would be served thereby. The Society is now, and at all times since 1923 has been, duly qualified, legally, financially, technically and by experience and in all other respects, to operate said station WOW.

3. Said station WOW represents an investment by the Society of assets, other than good will, having a present [fol. 255] value in excess of \$175,000, and said station WOW is a going concern which during its 18 years of operation by the Society has created values for the Society of over \$500,000 in good will.

4. The affiant has been associated with station WOW as General Manager since 1932, and is familiar with the operations of station WOW and radio broadcasting business in general, and with the radio broadcasting and radio network broadcasting business of National Broadcasting Company, one of the Plaintiffs herein and its relationship with station WOW in particular.

5. In 1927, the Society entered into a contract with the National Broadcasting Company for the broadcasting in the area served by station WOW of the programs sent out by the National Broadcasting Company over what is known as the "Red" network of said National Broadcasting Company. From time to time, other contracts of affiliation were entered into, and station WOW has continuously operated as an affiliate of the National Broadcasting Company since that date, the present contract under which such operations are conducted being dated December 2, 1936 and running for a period of five years thereafter. Under the aforesaid contract station WOW receives and broadcasts to its audience in the area served by the station both sustaining and commercial programs transmitted by the National Broadcasting Company. In addition station WOW broadcasts programs which it originates itself.

6. Approximately half of the broadcasts of station WOW are network programs of the National Broadcasting Company transmitted to station WOW by wire. The revenue derived by station WOW from the broadcasting of network programs of NBC has consistently amounted for several years to sums in excess of \$100,000 per annum.

7. During the 18 years of the operation of WOW the station has by the superiority of the programs broadcast by it acquired great popularity with a vast listening audience covering several states, reaching millions of listeners in the territory adjacent to the City of Omaha, Nebraska. The size of the audience and the popularity of the station is due largely to the high quality of the sustaining and

commercial programs received by station WOW from the [fol. 256] National Broadcasting Company transmitted through its network and broadcast by station WOW.

Without the aid of the organization and facilities of the National Broadcasting Company in furnishing high quality sustaining and commercial programs, including special events of national importance, it would be impossible for station WOW to give its listening audience the same high quality program material without great additional cost in personnel, equipment and facilities. The additional cost of providing programs of the same high quality and standard as those furnished by the National Broadcasting Company would materially impair the revenue producing ability of station WOW, and if the same high quality of the program material is not maintained, the station's popularity with its present radio audience would be materially reduced, with a resulting reduction in the value of the station as an advertising medium.

8. The Federal Communications Commission (herein referred to as the "Commission") is an administrative Commission or tribunal created by the Communications Act of 1934, approved June 19, 1934 (48 Stat. 1064; Code of Laws of United States, Title 47). On May 2, 1941, the Commission issued its original Order in Docket No. 5060 (Exhibit D to the verified complaint herein). On October 11, 1941, the Commission amended its Order in Docket No. 5060, a copy of such amendment being Exhibit E to the verified complaint herein. Said Order, as amended (hereinafter sometimes called "the Order"), is summarized in the verified complaint and the effective date of the Order is stated therein.

9. The Order of the Commission requires in effect a revision of the existing contract between the National Broadcasting Company and the Woodmen of the World Life Insurance Society, under penalty of losing its license to operate said station WOW. Affiant is informed and verily believes that the National Broadcasting Company cannot continue to supply the same high quality programs and profitably operate network broadcasting under the rules promulgated in the Order and continue to supply the same high quality of programs.

The Order places the onus on station WOW of breaching the existing contract by either failure to broadcast the

[fol. 257] network programs offered under the option time provisions of the contract or closing down the station, in violation of the express provisions of the existing contract. As a result the Woodmen of the World Life Insurance Society is in imminent danger of being subjected to a suit for damages for breach of the existing contract.

10. The revenue of station WOW, as well as of radio stations generally, is derived entirely from the sale of radio time to advertisers. The rates for radio time on station WOW, as well as on all other radio stations, are based upon the circulation that they can offer to the advertiser, that is to say on the probability that prospective customers will be listening to the programs being broadcast by the station.

The probability that a large number of prospective customers will be listening is increased if the programs broadcast by the station are of constant high quality and standard. Affiant believes that without the benefit of its contract of network affiliation with National Broadcasting Company station WOW could not broadcast programs of the high quality and diversification equal to those presently broadcast by it without incurring considerably increased expenses.

11. Affiant is informed and verily believes that the owners and operators of station WOW will suffer irreparable injury unless enforcement of the Order be restrained, in that:

A. The Society will be forced to breach the existing contract with the National Broadcasting Company with resulting danger of a suit for damages by National Broadcasting Company.

B. The Society will lose revenues from the broadcasting of commercial programs under said contract.

C. The station will be deprived of good will built up by its affiliation with the National Broadcasting Company over a period of 14 years.

John J. Gillin, Jr.

Subscribed and sworn to before me this 30th day of October, 1941. Florence E. Marger, Notary Public. Queens Co. No. 2625, Reg. No. 6868. Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369. Commission Expires March 30, 1943. (Seal.)

[fol. 258] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF EDWARD A. HANOVER

STATE OF NEW YORK,

County of New York,

Southern District of New York, ss:

EDWARD A. HANOVER, being duly sworn, deposes and says:

1. I am a Vice-President of Stromberg Carlson Telephone Manufacturing Company (hereinafter called "Stromberg Carlson"), one of the Plaintiffs herein. I am familiar with the radio broadcasting business in general and with Stromberg Carlson's radio broadcasting business in particular, and have been associated with Stromberg Carlson in the broadcasting business since its commencement of that business in 1927. I have read the verified Complaint herein and I am familiar with the facts therein stated. This affidavit is made in support of the application of the Plaintiffs herein for a temporary or interlocutory injunction and for a preliminary restraining order as prayed for in the Complaint herein.

2. Stromberg Carlson is the owner and operator of a 50,000 watt standard broadcast station located at Rochester, New York, and known as WHAM, which it has been licensed to operate since 1927. Stromberg Carlson acquired Station WHAM by purchase from the prior owner thereof, and Stromberg Carlson has been granted successive renewals of its license to operate said station both by the Federal Radio Commission since its creation in 1927 and by the Federal Communications Commission since its creation in 1934, upon findings as required by statute that the public interest, convenience and necessity would be served thereby.

3. When acquired in 1927 by Stromberg Carlson WHAM had a power of 100 watts. The power of the station was thereafter increased from time to time at considerable expense to Stromberg Carlson with the approval of the Federal regulatory authority having jurisdiction, in successive steps to the present power of 50,000 watts, which is the [fol. 259] maximum permitted by the present rules of the Federal Communications Commission.

4. Station WHAM has been affiliated with National Broadcasting Company, Inc., one of the Plaintiffs herein

(hereinafter called NBC) since 1927. During this period of time it has been affiliated with the Blue network of NBC. The terms of such affiliation are set forth in the present affiliation contract covering station WHAM between NBC and Stromberg Carlson, dated October 6, 1936, which originally ran for a period of 5 years but has subsequently been extended, on or about June 26, 1939, for an additional 5-year period so that its expiration date is now October 15, 1946. The present contract provides in general that:

(a) NBC will pay for special wirelines connecting the originating point of the program to WHAM.

(b) WHAM grants NBC an option to sell certain specified periods of the station's time, exercisable on 28 days notice, for the broadcasting of commercial programs.

(c) NBC will supply WHAM with a full schedule of sustaining programs; without monetary payment by the station or any obligation whatever upon the station to take any of said programs.

(d) As compensation for the network services rendered by NBC including sustaining programs, the assumption of wireline charges and services in selling the station's time, NBC retains a certain portion, and pays the station the balance, of the proceeds which it receives from advertisers for the sale of WHAM's time.

5. Station WHAM has a gross income from sales of its time to NBC and to local and other advertisers of approximately \$500,000 per annum. It owns its transmitter located outside Rochester, New York; leases studios located in Rochester; and employs approximately 60 persons.

6. In addition to broadcasting network programs received from NBC, station WHAM is the originating point for certain sustaining programs which are transmitted by NBC over its Blue network. Among such sustaining programs which originate in Rochester and are transmitted to [fol. 260] the Blue network by WHAM are those of the Rochester Civic Music Association which has approximately 8,000 individual subscribers. The Rochester Civic Music Association supports the Rochester Philharmonic Orchestra conducted by José Iturbi and the Rochester Civic Orchestra. In addition WHAM originates programs from the Eastman School of Music, which is part of the University of Rochester. Through WHAM's affiliation with NBC the musical programs from these orchestras have been broad-

cast regularly on a nationwide basis for approximately ten years. Not only has such nationwide broadcasting been made possible by WHAM's affiliation with NBC (to the resulting benefit of the nation as a whole) but in addition such affiliation has provided a national network outlet for one of the foremost musical centers in the United States.

7. As stated in paragraph 4 above, the present contract between NBC and Stromberg Carlson covering Station WHAM grants to NBC a firm option to sell certain specified periods of the station's time on 28 days notice. The above mentioned Order prohibits the inclusion of such an optional time provision in any contract between a network organization and a standard broadcast station. Because of said contract with WHAM containing provisions for such optional time, and similar contracts with other stations, NBC is in a position to sell time to advertisers on a national network, *as such*. If an option exercisable as against another network organization or exercisable on less than 56 days notice is prohibited it will be practically impossible to sell time to advertisers on a network basis, *as such*. As a result WHAM will receive less revenue under its affiliation contract with NBC. For the year 1940 the income of Station WHAM was derived approximately one-half from the sale of network time by NBC.

8. In 1941 there has been a substantial increase both in the amount of network time sold to NBC and the amount of time sold to local and other advertisers. Even with an increase in the sales to NBC, Station WHAM has been fully able to serve its local community in local advertising and in the broadcasting of all events of local interest. Sale of time to NBC and optional provisions of the contract have been equally beneficial to both the national and the local service of WHAM.

[fol. 261] 9. The receipt of high quality network programs from NBC has contributed substantially to the growth of WHAM's radio audience and this is reflected in the desirability of WHAM as an advertising medium. Stromberg Carlson estimates that the price at which it would be able to sell time to advertisers without network affiliation would be approximately one-half of the price which it currently receives.

10. The present license of Station WHAM expires on February 1, 1942. The Order does not by its terms require

the immediate modification of existing contracts. The Order simply provides that a license will not be granted if contracts are in force which contain provisions such as are set forth in the existing contracts between NBC and Stromberg Carlson. However, the Chairman of the Commission has stated at hearings before the Senate Committee on Interstate Commerce that operation of a station under an affiliation contract containing provisions which are prohibited by the Order is not an operation which is in the public interest. Furthermore the Chairman of the Commission also stated at such hearings that the Commission will issue an order revoking the license of any station which retains an affiliation contract containing provisions which are forbidden by the Order.

11. Cancellation of the affiliation contract with NBC will disturb an association which has existed for fourteen years and will inflict irreparable loss upon Stromberg Carlson. Furthermore, cancellation of the contract without the consent of NBC may result in suit by NBC against Stromberg Carlson for breach of contract. The Order places the burden on Stromberg Carlson of complying with the Order, which will cause irreparable damage to Stromberg Carlson through loss of revenue (and which may in addition subject it to damages for breach of contract) or, in the alternative, of not complying with the Order which may result in the loss of its license for Station WHAM.

Edward A. Hagover.

Subscribed and sworn to before me this 30th day of October, 1941. Florence E. Marger, Notary Public. Queens Co. No. 2625, Reg. No. 6868. Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369. Commission expires March 30, 1943. (Seal.)

[fol. 262] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

DISTRICT OF COLUMBIA, ss:

Telford Taylor being duly sworn says:

(1) That he is the General Counsel of the Federal Communications Commission and as such is familiar with the

Commission's proceedings taken under Order No. 37, Docket No. 5060.

(2) The said proceedings are as set forth in affiant's affidavit annexed to defendants' Motions to Dismiss the Complaint, or in the Alternative, for Summary Judgment, dated November 5, 1941.

(3) A certified copy of said proceedings has heretofore been filed with this Court in conjunction with defendants' Motions to Dismiss the Complaint, or in the Alternative, for Summary Judgment. It is incorporated herein by reference as Exhibit A.

(4) Affiant submits that Exhibit A is relevant on the issues sought to be raised by plaintiff's Motion for Preliminary Injunction and shows that said Motion should not be granted.

(Signed) Telford Taylor.

Subscribed to and sworn before me this — day of December, 1941. Duly acknowledged. _____,
Notary Public.

[fol. 263] IN DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRED WEBER, GENERAL MANAGER OF MUTUAL
BROADCASTING SYSTEM, INC., in Opposition to Motion for
Preliminary Injunction

STATE OF NEW YORK,
County of New York, ss:

Fred Weber, first being duly sworn, on oath deposes and says:

I

Affiant

Affiant is, and since the organization of Mutual in the fall of 1934 has been, in the employ of Mutual Broadcasting System, Inc. (herein referred to as "Mutual"), with the title of coordinator until 1936, and since then with the title

of general manager. Affiant is, and since the outset has been, a member of the Board of Directors of Mutual. Subject to the authority of the Board of Directors and the corporate officers of Mutual, none of whom (except the auditor) is paid any salary or other compensation by Mutual, affiant has at all times been, and is, the principal executive officer of Mutual, with active duties ranging over the entire field of Mutual's activities and operations. From 1926 to 1933 affiant was in the employ of plaintiff, National Broadcasting Company, Inc., serving successively in the commercial engineering, stations relations, and sales departments of that company. In 1933 affiant became vice-president and general manager of American Broadcasting System, a company which was organized in that year and which for a period of six months attempted without success to operate a national network. By reason of his past and present experience and duties, affiant is thoroughly familiar with the business of network broadcasting, embracing, and with particular reference to, its competitive aspects, including [fol. 264] present and past efforts, practices, and policies of the several national network organizations, in competing with each other in the sale of time to advertising agencies, advertisers, and others, and in securing desirable independently-owned broadcasting stations located in cities throughout the United States and elsewhere in North America to serve as network affiliates and as outlets for the broadcasting of network programs. Affiant appeared as a witness in behalf of Mutual in the proceedings before the Commission now under review (see transcript of record, pages 5116-5230 and 8249-8298) and actively participated in the preparation of exhibits and generally of Mutual's presentation before the Commission. Affiant also testified in behalf of Mutual at the hearing before the Senate Committee on Interstate Commerce on the so-called White Resolution (S. Res. 113) in June, 1941, on the subject-matter of the Commission's order now before this Court. Affiant has read and is familiar with the contents of the affidavits of Niles Trammell, William S. Paley and others heretofore filed with this Court in support of the motions of plaintiffs National Broadcasting Company, Inc., and Columbia Broadcasting System, Inc. (hereinafter referred to as National and Columbia) for temporary injunction and temporary restraining order, and makes this affidavit in opposition to said motions.

II

Mutual Broadcasting System, Inc.

1. *Corporate organization.* Mutual is an Illinois corporation organized October 29, 1934, with its principal office in Chicago, Illinois. The facts with respect to its history, business, and corporate organization from the date of its incorporation are correctly set forth in the Commission's Report on Chain Broadcasting of May 2, 1941 (at pages 26 to 28) as of that date. Mutual has outstanding a total of 99 shares of common stock (out of an authorized total of 500 shares of common stock, there being no other class of stock), held by seven stockholders, each of whom (with the exception of Colonial, noted below) directly owns and operates one or more broadcast stations, and two of whom (Colonial and Don Lee) operate regional networks, as follows:

[fol. 265] Shareholder	Number of Shares	Call Letters of Station or Stations	Location of Station
WGN, Inc.	25	WGN	Chicago, Ill.
Bamberger Broadcasting Service, Inc.	25	WOR	New York, N. Y.
Don Lee Broadcasting Co.	25	KHJ	Los Angeles, Cal.
		KFRC	San Francisco, Cal.
		KGB	San Diego, Cal.
		KDB	Santa Barbara, Cal.
Colonial Network, Inc.*	6	WAAB	Boston, Mass.
		WNAC	Boston, Mass.
		WEAN	Providence, R. I.
		WICC	Bridgeport, Conn.
United Broadcasting Co.	6	WHK	Cleveland, O.
		WCLE	Cleveland, O.
		WHKC	Columbus, O.
Cincinnati Times-Star Co.	6	WKRC	Cincinnati, O.
Western Ontario Broadcasting Co., Ltd.	6	CKLW	Windsor, Canada (in the Detroit area)

* Colonial Network, Inc., is not the licensee of the four stations set opposite its name. The licensee of these stations is Yankee Network, Inc., a corporation owned by the same interests.

Steps have been taken as a result of which one or more of four of the foregoing (Colonial, United, Western Ontario, and Cincinnati Times-Star) may have their shareholdings increased from 6 shares to 25 shares each (the matter being at present in process of negotiation and study), and four other concerns will or may be added to the list of shareholders, with either 6 shares or 25 shares each, owning

and operating broadcast stations affiliated with Mutual as follows:

Prospective Shareholder	Call Letters of Station or Stations	Location of Station
Pennsylvania Broadcasting Co.....	WIP	Philadelphia, Pa.
WCAE, Inc.....	WCAE	Pittsburgh, Pa.
Baltimore Radio Show, Inc.....	WFBR	Baltimore, Md.
Buffalo Broadcasting Corporation.....	WGR	Buffalo, N. Y.

Mutual has a Board of Directors with nine members, based on representation of the shareholders in proportion to their shareholdings, and also including affiant. Pursuant to its cooperative purposes and character, and to insure a fair representation of the interests and points of view of its shareholders and affiliates, as well as of the various communities and sections of the United States, Mutual, in addition to the representation of its shareholders on its Board of Directors, maintains an Operating Board composed of representatives of all its present and prospective shareholders and also two representatives of affiliates other than shareholders.

2. *Sources of revenue.* Mutual's expenses of operation are met through funds derived (a) from commissions retained by Mutual out of sums received from advertisers and others for use of time over the stations constituting the Mutual network, together with specific contributions from shareholders and affiliates for wire-line expenses, and (b) from contributions from Mutual's shareholders fixed in accordance with contracts between them and Mutual.

III

Mutual Network Operations

1. *General scope and character.* Like its older competitors, National and Columbia, Mutual is engaged in the operation, and in performing all the functions, of a national network organization, both within the definition accepted by the Commission in its Report and within the definition generally accepted in the industry and according to popular usage. Like said competitors, Mutual is engaged in supplying a daily network program service consisting of both commercial and sustaining programs, totalling over 112 hours a week over a system of telephone wire-lines to broadcast stations scattered over a large part of the United

States. In addition, this program service is supplied continuously to one station in Canada, is made available, and to a substantial extent is used by, many other stations in Canada, and in part, is supplied to stations in Hawaii by radio.

2. *Broadcast stations affiliated with Mutual.* Beginning in the fall of 1934 with an association of four broadcast stations located in New York, Chicago, Detroit, and Cincinnati, and expanding by gradual steps into a network of national scope and character, Mutual now has (as of November 1, 1941) a total of 190 broadcast stations in the United States, Canada, Alaska and Hawaii. A correct list of these stations, together with data as to the power, frequency and hours of operation of the stations, the cities in which they are located and the population thereof, and their primary affiliations, if any, with National and Columbia, appears in [fol. 267] Appendix A, attached hereto. This total includes stations owned by its shareholders, stations affiliated with certain regional networks which in turn are either shareholders of Mutual or are affiliated with it, and other independently-owned stations not falling within either classification. While the list of affiliated stations appears large, actually, in terms of effective use as outlets for network programs, the network is under severe handicaps. These are due primarily to the fact that, as hereafter more fully appears, the restrictive provisions in the contracts between National and Columbia, condemned in the Commission's Report and forbidden by the Regulations now under review, completely bar Mutual from many important cities and markets, and entirely or largely bar Mutual during the more desirable broadcasting hours from many other important cities and markets; or make Mutual's access thereto subject to such conditions and uncertainties as to burden it with a heavy competitive disadvantage. In addition, as appears in Appendix A, Mutual's list of affiliated stations contains relatively few stations of high or medium power with large coverage; it is largely made up of stations of low power and limited coverage. Many of them are in smaller cities which Mutual's competitors have passed over. In a number of instances groups of several such stations are necessary to furnish coverage even partially approaching that of single stations of larger power affiliated with either of said competitors. Appendix B, attached hereto, contains

a comparison of the stations affiliated with each of the four national networks in these respects.

3. *Wire-lines for transmission of network programs.* Like its said competitors, Mutual maintains an extensive and virtually nationwide system of telephone wire-lines suitable and continuously available for the transmission of network programs from the places of origination to the stations constituting the network, the total mileage of said circuits being approximately 15,000 miles, at an annual cost of \$1,200,000. These wire-lines are, for the most part, leased directly from the telephone company by Mutual but, in some instances, are secured by virtue of arrangements between Mutual and certain of its shareholders and affiliates who, in turn, lease the wire-lines from the telephone company. Mutual's wire-line system compares favorably with the wire-line systems of National and Columbia in [fol. 268] mileage and costs¹ and, to the extent that it is less, it is due somewhat to the fact that Mutual is a younger network but more to the effect of the restrictive provisions in the National and Columbia contracts barring Mutual from many communities and regions. In addition to its regular wire-line system, whenever necessary or desirable, Mutual arranges for additional circuits on a temporary basis to supply to the network programs originating at points not on the network, and similarly for transmission by radio or wire to the United States of programs originating in foreign countries for use over its network.

4. *Mutual's network program service—general.* Like its said competitors, Mutual supplies a network program service, consisting of both commercial and sustaining programs, to its affiliated stations. This service averages not less than 16 hours daily or a total of over 112 hours weekly. Frequently, additional hours of program service are supplied, including, on some occasions, service throughout the entire 24 hours of the day for the covering of events of

¹ According to Trammell's affidavit, page 13, "NBC's wireline expenses in 1940 aggregated in excess of \$3,600,000" for two national networks. According to Paley's affidavit, page 9, the cost is "over \$2,000,000 a year." Both these figures apparently include the cost of special, local occasional or temporary lines in addition to those used regularly as part of the network systems.

major importance. The network program service thus supplied by Mutual is substantially the same in continuous character, content, quantity, quality, and expense of production as the network program services supplied by National and Columbia to their respective affiliates, differing only as (but not to the extent that) would be naturally expected of a younger organization having a smaller volume of business and suffering from the competitive handicaps imposed by National and Columbia's restrictive contracts.

5. *Commercial network programs.* Like its said competitors Mutual is engaged in selling time on the stations constituting its network to advertisers, usually through advertising agencies (in most instances through a sales organization maintained by mutual but, in some instances, through sales organizations maintained by its shareholders [fol. 269] or affiliates), for commercial network programs, to be supplied over the Mutual telephone wire-line circuits to as many of the stations as the advertiser can be persuaded to pay for. Because Mutual is a younger network, and more particularly because of the obstacles created by National's and Columbia's restrictive contracts, Mutual has not been able to, and does not provide, as great a volume of commercial network programs to its affiliated stations as do its said competitors, but there is otherwise no substantial difference in the commercial network program service supplied by Mutual and that supplied by its said competitors. As is the case with the latter, and in substantially the same manner, most of Mutual's commercial network programs are largely produced and paid for by the advertising agency and not by the network organization. Those not so produced are, in the case of Mutual, produced principally at the stations and by the staffs and facilities of Mutual's shareholders, chiefly at New York, Chicago, and Los Angeles, in substantially the same manner, and with the same results, quality, and effects, as those produced at the so-called key stations of said competitors.

6. *Sustaining network programs.* Like its said competitors, Mutual is engaged in supplying a sustaining program service to its affiliated stations during hours not occupied by commercial network programs. This sustaining program service exceeds 84 hours weekly and consists, in general, of the same character of cultural, educational, religious and public service programs as those supplied by its said

competitors, and differs only in that (1) because of its smaller volume of commercial network programs, Mutual furnishes a greater volume of sustaining network programs in terms of hours per week than do its competitors, and (2) because, with certain exceptions (consisting principally of broadcasts of news and special events originating in foreign countries), such sustaining programs are produced not by Mutual as a corporate entity but by its shareholders and affiliates, principally those at New York, Chicago, and Los Angeles, but also, to a substantial extent, by its shareholders and affiliates elsewhere. The selection of sustaining programs to be supplied to the network is made by Mutual through a competent staff by choosing the best from all such programs broadcast or proposed to be broadcast by its shareholders and affiliates. The actual annual cost [fol. 270] of production of such sustaining programs compares favorably with the sustaining program costs of National and Columbia.² In the production of sustaining programs, the studios, staffs and equipment of Mutual's principal shareholders serve substantially the same purposes and perform substantially the same functions as the so-called key stations of its competitors.³ The Mutual method of supplying sustaining programs has several recognized and demonstrated advantages in that (1) it encourages shareholders and affiliates, with stations in many

² According to Trammell's affidavit, page 15, National's two national networks, the Red and the Blue, "required the expenditure of more than \$3,000,000 for talent and material alone." According to Paley's affidavit (p. 10) "In 1940 alone, CBS expended in excess of \$5,000,000 on sustaining programs." This latter figure, however, includes an arbitrary allocation of Columbia's overhead, administrative expenses, wire-line rentals, etc. The cost of producing simply those of Mutual's sustaining programs (in terms of talent and material alone) which originate at WOR, New York, WGN, Chicago, and KHJ, Los Angeles, exceeds \$1,250,000 annually and, when the cost of sustaining programs at other points is added, substantially exceeds this figure.

³ It is to be noted that at one of the principal points of program production, Los Angeles, National does not own or operate any station.

parts of the country, to produce good sustaining programs in the expectation that they will be accepted on the network and broadcast to a nation-wide audience, with appropriate credit in each instance to the station and the locality originating the program; instead of having the function of providing sustaining programs appropriated entirely by the network organizations,⁴ (2) through the Mutual system of compensation to stations hereinafter described, funds are provided to shareholders and affiliates for this purpose instead of being retained by the network corporation,⁵ (3) the [fol. 271] public is provided with a highly desirable diversity of points of program origination, and (4) the tendency toward undue concentration of talent and facilities for the production of programs in two or three large cities is materially neutralized. The excellent and varied character of Mutual's sustaining program service, provided in this manner, appears from the listings of regular sustaining features supplied over its networks and by the fact that in several instances where a station is or has been affiliated with both National's Blue Network and the Mutual network, the affiliate has frequently taken more hours of the Mutual sustaining service than it has of National's sustaining service. Statements and insinuations disparaging either the quantity or quality of this service, such as those appearing in Mr. Paley's affidavit (at pages 6-8, 29-30) and Mr. Trammell's affidavit (at page 7), are simply contrary to well-known or easily ascertainable facts.

7. *Ownership of stations, studio facilities, etc.* Unlike its said competitors, Mutual, as such, does not own or operate any broadcast station. As appears from what has already been stated, however, the broadcast stations of certain of its shareholders, principally those in New York, Chicago, and Los Angeles, but to some extent also the broadcast stations of the other shareholders and of certain of Mutual's affiliates (including its affiliate WOL at Washington, D. C.) serve substantially the same purposes and

⁴ Mutual's programs originate at an average of not less than 18 different cities each week (Transcript of Record p. 5267).

⁵ As stated in Paley's affidavit (p. 5), "The quality of sustaining programs can be improved by the individual station when its revenues from advertising increase."

perform substantially the same functions as the so-called key stations of National and Columbia,* so far as they are either necessary or desirable for successful network operation. The stations which serve such purposes for Mutual have elaborate studios in buildings specially built or [fol. 272] adapted for the purpose, maintain competent engineering staffs, and maintain ample facilities for the production of programs, which compare favorably to those of National's and Columbia's so-called key stations, and, in some instances and in some respects, are superior thereto. Charges such as those made in Mr. Paley's affidavit (pp. 7-8, 30), that

"Mutual has no studios, maintains no engineering department, neither owns nor maintains any facilities for the production of programs and does not originate or produce a network program service such as is maintained by CBS and NBC"

apply only to Mutual as a separate corporate entity and are distinctly untrue of Mutual in its operation as a network.

8. *Basis of compensation to stations.* Unlike its competitors, Mutual has not attempted, and does not attempt, to fix, by contract or otherwise, the rates to be charged advertisers and others for the use of time over stations constituting its network. The rates charged by Mutual are simply the sum total of the rates of the stations used, save only in the case of certain volume discounts, but even in such case the discounts are also based on the stations' rates. Of the sums received from advertisers and others, Mutual retains a commission determined in advance by

* It is to be noted, for example, that National does not own or operate a station at one of the principal production points, i. e., Los Angeles, and that National and Columbia each own and operate stations at cities in which the other does not own or operate a station (e. g., at Cleveland, St. Louis, Minneapolis, Charlotte, Denver, and San Francisco). It is to be also noted that, at each of their stations, including the so-called key stations, both National and Columbia sell substantial amounts of time for local or national spot commercial programs and, in the periods thus sold, do not broadcast their excellent sustaining programs.

contract between it and the affiliate, which in the normal case is either large enough to include, or is supplemented by, the affiliate's share of the cost of wire-lines to connect it with the Mutual system, and, in the case of shareholders, Mutual also retains each shareholder's agreed contribution toward its expenses of operation. Because of this basis of compensation, Mutual, on the whole, pays to its affiliates a larger proportion of the sums received from advertisers for the use of the affiliates' stations than is paid by National and Columbia, although, because of its smaller total volume of business, the actual total sum paid to its affiliates is, in most instances, less.

9. *Mutual's contracts with affiliates.* Prior to February 1, 1940, Mutual's contracts with its affiliates (with the exception of a network exclusivity provision with one shareholder and territorial exclusivity provisions with the same shareholder and a few affiliates) did not contain provisions [fol. 273] contravening the Commission's Regulations, either in their original form as adopted May 2, 1941, or as amended October 11, 1941. Since February 1, 1940, as is more particularly set forth in the Commission's Report (see particularly pages 35-37) and for the reasons therein stated, Mutual's contracts with its shareholders, its prospective shareholders, and one or two of its other affiliates have contained provisions of exclusivity and of exclusive time-options (from 3¼ to 4¼ specified hours on week days and 6 hours on Sundays) which contravene said Regulations, but the contracts provide that these clauses shall lapse if the Commission prohibits them, or if the other national networks voluntarily abandon them and; at the time the contracts were entered into, Mutual advised the Commission of the fact, of the reasons therefor, and of its willingness and desire to abandon them in the event such Regulations should be adopted. Immediately after the Commission's order of May 2, 1941, Mutual prepared a contract to conform with the Regulations in their original form and, on submission thereof to the Commission, secured the Commission's informal approval on June 19, 1941. A copy of this contract appears in the printed Hearings on S. Res. 113 at pages 565-9. Had it not been for the delays thereafter in putting the Regulations into effect, this contract would have been forthwith submitted by Mutual to all its shareholders and affiliates and, as affiant is informed

and believes, would have been executed by them and would now be in full force and effect. Among the provisions of the contract, thus informally approved by the Commission, were the following:

"2. Mutual and the Broadcaster will each publicize the Station as the regular Mutual outlet in the city in which the station is located. The station shall have the right to the first call on Mutual network commercial and sustaining programs in said city and Mutual shall not offer any series of programs or single program (not a part of a series) to any other radio station located in said city unless said series of programs or single program has been offered to the Broadcaster for broadcasting through the Station under this contract and the Broadcaster shall have failed or refused to accept such program or programs within forty-eight (48) hours after Mutual's offer. In the case of a [fol. 274] commercial program or a series of commercial programs:

"(a) If the Broadcaster is unable to clear the required period or periods of time on the station for such program or programs but notifies Mutual within said 48 hours that the Broadcaster can clear a mutually satisfactory substitute period or periods and is able and willing to broadcast the program or programs by means of the off-the-line recordings (made by the Broadcaster without cost to Mutual or the advertiser) during such substitute period or periods. Mutual will accept such substitute period or periods, unless the advertiser is unwilling to accept such broadcasting by the Station by means of off-the-line recordings during such substitute period or periods, it being understood that Mutual is not obligated to require the advertiser to accept such delayed broadcasting; and

"(b) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs scheduled to run for 13 weeks or more, or a series of separable programs, but notifies Mutual within said 48 hours that the Broadcaster will clear said periods of time upon a specified date not later than four (4) weeks after the commencement of the series of programs, Mutual will contract for such periods of time on the Station as of the specified date upon which the Broadcaster is able to clear such periods, unless the advertiser refuses to accept such postponement of broadcasting on the station.

"If the Broadcaster fails or refuses to accept said program or programs or if the Broadcaster is unable to clear the required period or periods of time and Mutual is unable to persuade the advertiser to use a substitute period or periods or to postpone the commencement of such programs on the Station, as provided in the preceding subparagraph, Mutual may contract with any other station located in said city for the broadcasting of said commercial program or programs. In the case of a single sustaining program or series of sustaining programs:

"(a) If the Broadcaster is unable to clear the required period or periods of time for such program or programs but notifies Mutual that the Broadcaster will broadcast the program or programs by transcription at a mutually satisfactory substitute period or periods, Mutual will not offer [fol. 275] said program or programs to any other station in said city; and

"(b) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs, Mutual, in offering said series of programs to any other station in said city, will offer said series subject to recapture by the Station on one (1) week's notice to Mutual. It is understood, however, that notwithstanding the foregoing, Mutual may make available to any other station in said city special sustaining programs of great public importance (such as, but not limited to, addresses of the President of the United States.)"

On October 31, 1941, affiant sent to each of Mutual's shareholders and prospective shareholders a letter, a copy of which is attached hereto as Appendix C, and an informal interim agreement, a copy of which is attached hereto as Appendix D. The last-mentioned agreement was assented to by all of its said shareholders and prospective shareholders and Mutual is now operating thereunder without experiencing any difficulty or inconvenience by reason of any provision based on, or required by, the Regulations. Shortly thereafter, Mutual completed preparation of another contract to conform to the amended Regulations of October 11, 1941, a copy of which is attached hereto as Appendix E. Had it not been for subsequent delays in the effective date of the amended Regulations, due to the motions of plaintiffs now under consideration and to the stip-

ulation between plaintiffs and the Commission, this contract would already have been submitted to Mutual's shareholders and affiliates and, as affiant is informed and believes, would have been executed by them and would now be in full force and effect.

IV

Mutual's Attempts to Secure Interim Relief in the Proceedings Before the Commission

1. *Initiation of the proceedings.* As stated in the Commission's Report (page 1), the proceedings before the Commission commenced with the Commission's Order No. 37, adopted March 18, 1938. Neither Mutual, nor, so far as is known to affiant, any officer, employee or representative of Mutual had made any complaint to the Commission on the [fol. 276] subject-matter of the proceedings, or had taken any step which led or had any part in leading the Commission to initiate the proceedings.

2. *Participation in the hearing.* As was the case of its competitors, pursuant to notice by, and request from, the Commission, Mutual entered its appearance and thereafter presented evidence before the Committee in charge of the hearing. Its witnesses (including affiant), to the best of their ability, produced the facts and information called for by the Commission's notice or requested by its counsel. The evidence presented in behalf of Mutual appears principally at pages 4845 to 5428 (February 7 to 14, 1939) and pages 8249 to 8298 (April 18, 1939) of the transcript of record, and in Exhibits Nos. 368 to 435. The hearing extended from November 14, 1938 to May 19, 1939.

3. *Mutual's motion of April 19, 1939.* The injuries to Mutual and its affiliated stations resulting from the restrictive contracts of National and Columbia having steadily persisted and increased during the course of the hearing, and the threatened future injuries appearing likely to become greatly aggravated through the increasing activities of National and Columbia (both of which organizations were, in apparent defiance and attempted nullification of the Commission's power and jurisdiction, busily engaged in attempting to secure long-term renewals of their restrictive contracts with affiliates), Mutual, on April 19, 1939, sought

interim relief from the Commission through a motion the nature of which, and the arguments presented in support and in opposition, appear at pages 8454-8463 of the transcript of record. In substance, the motion sought the immediate adoption by the Commission of a regulation which would have forbidden licensees to enter into affiliation contracts with network organizations, or into any renewal or extension of existing affiliation contracts, for a period extending beyond December 31, 1940, at least in cities having less than four stations with comparable facilities (R. 8457, 8459). The motion was taken under advisement by the Committee (R. 8463).

4. *Renewal of the motion in July, 1939.* No action having been taken on said motion, on July 6, 1939 Mutual filed a formal motion in writing asking that the Committee recommend to the Commission at an early date the adoption of a regulation in substance as follows:

[fol. 277] "No licensee of a standard broadcast station shall enter into a contract, agreement or other arrangement with any network organization covering or dealing with the affiliation of such licensee's station with the network organization, or into any, renewal or extension of any such existing contract, agreement or other arrangement, or exercise any option or other privilege contained in any such existing contract, agreement, or other arrangement for renewal or extension thereof, for a period extending beyond . . .",

suggesting that the date to be specified in the foregoing be such as to allow sufficient time for the conclusion of the proceedings and the issuance of such regulations as might result therefrom. On July 14, 1939, Mutual filed a supplement to said motion incorporating facts and events occurring since the filing of the motion. As appears in greater detail in said motion and supplement as contained in the record, National was in the process of obtaining, and did obtain, an exclusive and time-option contract with respect to WLW, a 50 kw. clear channel station which had theretofore been free of such restrictions and had been Mutual's affiliate in Cincinnati and one of its basic and most important outlets. Mutual was thereafter completely excluded from said station. The contract was secured by National, as affiant is informed and believes, with the primary intent

and purpose of crippling Mutual as a competitor⁷ by depriving it of access to one of its most important outlets. No action on said motion or supplement was taken by either the Committee or the Commission.

5. *Renewal of the motion on July 17, 1940.* The Committee having made its report to the Commission on June 12, 1940, and the injuries to Mutual resulting from the restrictive contracts having persisted and increased, Mutual renewed its motion formally and in writing on July 17, 1940, as appears more fully from the record. No action, however, was taken by the Commission on the motion further than to announce in a release issued July 26, 1940 that the [fol. 278] advisability of adopting the temporary regulation requested by Mutual was one of the subjects to which briefs should be directed. No temporary or interim relief having been granted to Mutual, the Commission on May 2, 1941, over 3 years after initiating the proceedings, adopted the Regulations which, as later amended on October 11, 1941, are now sought to be further delayed from going into force and effect.

V

Irreparable Injury to Mutual Through Maintenance of Restrictive Contracts

1. *The contract provisions involved.* The provisions in contracts between National and Columbia and their respective affiliates which have caused, are now causing, and will cause great and, affiant believes, irreparable injury to Mutual are those forbidden by Regulations 3.101 and 3.104 of the Commission, as amended, and, to an incidental but nonetheless important extent, those forbidden by Regulation 3.103. These contract provisions, generally described, consist in

a) provisions by which the affiliate agrees not to broadcast the programs of any other network organization;⁸

⁷ Thereafter, after sale by Columbia of a station (WKRC), theretofore owned and operated by it in Cincinnati, to Cincinnati Times-Star Co., Mutual obtained an outlet in that city.

⁸ Such provisions are contained in virtually all contracts between Columbia and its affiliates and, at least until recently, have been contained in contracts between National

b) provisions by which the affiliate grants to the network organization an exclusive option, exercisable on 28 days' [fol. 279] notice, either on all its hours of operation,⁹ or on its more desirable hours in the morning, afternoon, and evening periods;¹⁰ and

c) provisions by which the term of such contracts is fixed at a period of 5 years or more.¹¹

In addition, the ownership by National and Columbia of broadcast stations in certain communities, more particularly in two communities served by less than four full-

and some 35 of its affiliates. From the fact, however, that all mention of the exclusivity clause is omitted from National's complaint (see par. 21 at p. 7 of the Complaint), that the form of affiliation contract attached to the Complaint as Exhibit A contains no such clause, and from the omission of Trammell's affidavit to mention or to justify such a clause, affiant is led to believe that National has abandoned the exclusivity feature. Affiant is informed that on or about December 4, 1941, National advised its affiliates that it has abandoned this feature of its contracts.

⁹ Such provisions are contained in contracts between National and not less than 30 affiliates in the western part of the United States, including the Pacific Coast, and in contracts between Columbia and virtually all its affiliates. Beginning about 1937 Columbia has introduced an apparent limitation in its contracts which has since then been extended to most of them, namely, that the total amount of time per week upon which Columbia may exercise its option shall not exceed 50 "converted" hours (the equivalent of approximately 79 clock hours in actual practice, since 2 day-time hours are deemed the equivalent of one evening hour). Since the hours under option are not specified, however, the Columbia provision is the equivalent of an option on *all* the station's time until the maximum is reached.

¹⁰ Such provisions are contained in practically all the remaining contracts between National and its affiliates, and cover the hours from 10 a. m. to 12 noon, from 3 p. m. to 6 p. m., from 7 p. m. to 7:30 p. m., and from 8 p. m. to 11 p. m.

¹¹ This is true of nearly all contracts between National and Columbia and their respective affiliates.

time broadcast stations (covered by Regulation 3.106) has had the same restrictive effect, but, in order not to complicate the discussion, such ownership will not be separately treated in this affidavit.

2. *The limited number of broadcast stations in many cities.* While there are, as of November 1, 1941, 877 broadcast stations in licensed operation in the United States,¹² many of these stations are wholly or partly unsuitable or unavailable as network outlets, because of their non-commercial character, or because of restrictions on their hours [fol. 280] of operation (e. g., stations required to close down at sunset or shortly thereafter), or because of inadequate coverage to serve the cities in which they are located (due to low power or undesirable frequency or interference), or because they are located in towns which are too small to be attractive to advertisers or are within areas served by four or more stations. There are only approximately 21 cities adequately served by 4 or more full-time broadcast stations. Of the remaining cities, approximately 24 are adequately served by 3 full-time broadcast stations; 59 are adequately served by 2 full-time broadcast stations; and, of cities having a population over 50,000, 44 are adequately served by only one full-time broadcast station. A list of cities classified according to the number of full time stations located therein and also according to the number of full time stations from which such cities receive adequate service is set forth in Appendix F, attached hereto. Many of the cities adequately served by only 3 full-time stations, some of the cities adequately served by only 2 full-time stations, and a few of the cities adequately served by only 1 full-time station, are of large or substantial population, or are the centers of recognized trade areas, constituting attractive markets for national advertisers. Because of technical reasons having to do with the limited frequencies available for use by broadcast stations, and limitations on the extent to which two or more stations can operate simultaneously on the same or adjacent frequencies without undue interference, it is, generally speaking, impossible in the present or any immediately foreseeable future state of the art to provide additional full-time stations in such cities.

¹² In addition, as of November 1, 1941, construction permits were outstanding for 38 new stations.

3. *Effect of contract provisions on network access to markets.* With four national networks in operation, the effect of the contract provisions described is that in any city having less than four full-time stations, one (or more) of the networks is either entirely or largely barred from access for its program service to the city and its environs, and from offering coverage of the city and its environs to any national advertiser, depending on the type of restrictive provisions in effect with respect to the stations serving such city. Similarly, the listening public in any such city is either entirely or largely barred from access to the program services of such network or networks. In actual [fol. 281] practice, under existing contracts, there are 7 cities (shown in Appendix F) adequately served by only 3 full-time stations in which Mutual's only access is through stations primarily affiliated with National under contracts which, while not containing the exclusivity feature, contain option-time provisions covering most of the station's more desirable hours.¹² In such cities, Mutual's only access has been (a) to the less desirable hours not covered by option, or (b) to the hours covered by option not in actual present use by the network having the option but subject to use by that network on 28 days' notice. In 23 cities served by only 2 full-time stations (shown in Appendix F), Mutual is effectively and as a practical matter denied access because of the restrictive provisions, and in 9 other such cities (likewise shown in Appendix F) Mutual's only access is subject to option-time provisions in favor of its competitors. For the most part, the cities and towns having only 1 full-time station rendering adequate coverage are smaller in population and are less important as markets, but they nevertheless include a fairly large number of important centres from which Mutual is completely barred.

4. *The national advertiser's interest in access to markets.* The commercial use of networks of national scope (such as those of National, Columbia, and Mutual) for sponsored programs is by national advertisers, that is, concerns having or desiring markets for their products or services generally throughout all or most of the country, and therefore interested in having their programs heard by as large a

¹² See footnote 10 above.

portion of the public as is possible, consistently with the amount of money available to them for radio advertising and the probable return therefrom. This interest naturally centers first on the larger cities, which, because of concentrations of population not only within their corporate limits but also in their environs and in the trade areas tributary to them, generally provide the larger audiences per station and are vital to any national advertising campaign. The interest extends, however, to medium-sized and, progressively, to smaller cities and their respective trade areas, until a point is reached where the prospective audience may be too small, in proportion to the outlay and prospective [fol. 282] return, to attract the advertiser. It has been the experience of all networks (including Mutual), however, that as a sponsored program gains an audience in the larger markets and demonstrates its value to the advertiser, the advertiser seeks to extend the program to other and smaller markets, over a larger network of stations, and over a larger portion of the country. Thus, sponsored programs which at the outset were broadcast over comparatively few stations in the larger cities and in only a portion of the country's area have almost regularly been extended so as to be broadcast over a nation-wide network. In addition to the foregoing, there are national advertisers who, because of the location of their dealers, distributors, jobbers, sales organizations, or retail stores, or because of regional differences in habits and in demand for particular products or services, or because of the advertising campaigns of competitors, require access to certain but not all of the smaller markets in addition to the larger markets.

5. *The national advertiser's interest in continuity of his sponsored program.* Contracts between network organizations and advertisers (usually through advertising agencies) for the use of a network of stations for the broadcasting of a sponsored program are customarily for a period of 52 weeks, cancellable at the end of any 13 weeks' period. It is the experience of all networks (including Mutual) that if use of the network has given satisfactory results and the advertiser's needs and desires with respect to continuous service and expansion are met, the great majority of such contracts are renewed from year to year for use of the same network on the same day, and at the same hour with the same, or an improved, character of program. A vital and

usually determinative factor, however, in persuading an advertiser to enter such a contract with a particular network organization in the first instance, or to continue with and to renew such a contract thereafter, is the ability of the network organization to assure the advertiser of continued and uninterrupted regular broadcasting of his program over the stations which the advertiser has agreed to use, for the period of the contract and on the day and at the hour selected by the advertiser. The reasons for the importance of this factor include the following:

a) Most sponsored network programs entail large expenditures by the advertiser for talent and material used [fol. 283] in the production of such programs. This is made possible by the fact that, through the use of wire-line systems, the same program can be transmitted for simultaneous broadcasting to the audiences of many stations; and therefore to a much larger public, with a correspondingly greater return to the advertiser, without any increase in the cost of producing the program. The loss of audience resulting from unavailability of access to a desired market, or from discontinuance of the program by any station on the network in such a market, means a corresponding diminution in the return to the advertiser for his outlay.

b) Any sponsored network program requires a substantial period of time (usually not less than eight weeks and frequently longer) before it acquires a regular audience and a goodwill with the public served by a particular station of a character satisfactory to the advertiser, and, once it has acquired such an audience and goodwill (which, in the case of any good program, increases with the length of the period of time during which the program is broadcast), the advertiser has a considerable investment therein which is lost if the station becomes unavailable and the advertiser is deprived of access to the market.

c) When a new network commercial program is about to be broadcast, or is being broadcast, it is the practice of the advertiser sponsoring the program to make large expenditures for promotional advertising in newspapers and other media to attract public attention to the program, and to take appropriate steps to inform his dealers, distributors, jobbers, sales organizations or retail stores in each community about the program and enlist their coop-

eration in promoting public interest therein by advertising and other means. The advertiser has a considerable investment resulting from such expenditures in each community, which is lost if the station in that community becomes unavailable and the advertiser is deprived of access to the market.

d) Most network commercial programs have a continuous and connected character, frequently having a nature and importance corresponding to that of instalments in a serial story, or of sequels. In addition, a vital feature of successful radio advertising is consistent repetition at regular and scheduled intervals, known to and expected by [fol. 284] the public. Much of the value of such programs to the advertiser is in preserving a regular audience for such programs against interruption or discontinuance thereof, and against shifts in the day and hour for which they are scheduled. Particular hours in the day are more important to the advertiser than other hours, either because (as in the case of certain evening hours, such as 8 p. m. to 10:30 p. m.) there is a greater potential audience, or because some hours are more appropriate for a given type of program than other hours. Ordinarily, the advertiser has, at the outset, selected the best hours available for his purposes. If, by reason of a station's becoming unavailable at the scheduled hour, the advertiser is compelled to shift his program to another hour on the same station, he suffers serious disadvantages and loss of return on his expenditures because (1) the audience built up for the scheduled hour is dislocated and is temporarily and, to some extent, permanently lost (not infrequently to a competitor), and a new audience must be built up, with corresponding expenditures for promotion; (2) the hour to which the program is shifted (sometimes to the next day) is usually less desirable with respect to potential audiences, or appropriateness for the program, or timeliness, and may, in turn, likewise be subject to further shifting and repetition of the same experience; (3) when such shifts occur, the broadcasting of the program over the station involved must be done by transcription and, under the regulations of the Federal Communications Commission, must be announced as such, with a consequent and very real loss in the effectiveness of the program with the public as against a broadcasting of the program instantaneously at the time of performance by live talent.

(4) the network commercial programs of one or more competitors of the advertiser may, and frequently are, being broadcast over other stations (or the same station) in the same market without being subject to these disadvantages.

6. *Factors necessary to assure equal competitive opportunity for national networks.* In order to have equal opportunity in securing commercial network programs from national advertisers, a national network organization must be able to offer, on a footing substantially equal to that of its competitors, (a) access to the markets desired by such advertisers, and (b) assurance of the continued broadcasting [fol. 285] of the advertisers' programs at the desired and scheduled time in such markets.¹⁴ Inability in either respect necessarily results in a preference for, and a choice by, national advertisers of other national network organizations not thus handicapped, both in originally placing their business and in continuing business already placed, even though in all other respects such advertisers may prefer the handicapped organization on its merits. Many cities are of such importance (including a number of cities adequately served by less than four full-time stations, from access to which Mutual is either completely barred, or is barred on a continuous basis during the more desirable hours, by the restrictive contracts of National and Columbia, as shown in Appendix F) that the inability of one network and the ability of a competing network to afford access thereto on a continuous basis to a single such city will usually determine the choice of the advertiser. Other cities (including a large number adequately served by less than four full-time stations, from which Mutual is either wholly or largely barred as aforesaid) are of sufficient importance so that, while such access to a single such city may not determine the advertiser's choice, access to two, three or a larger number of such cities, depending on their importance and their ap-

¹⁴ As stated by Mr. Paley in his affidavit (pages 12-13):

"Nor will the advertiser embark upon the costly venture of a nationwide radio program series unless the relations between the network he selects and its affiliated stations are sufficiently stable so that he may reasonably expect to maintain his coverage and enjoy the cumulative fruits of his efforts to please the listening public and promote sales of his product."

peal to the particular advertiser, will determine his choice. The choice by an advertiser of one network over another for such reasons results in loss of revenue for the latter network and its affiliates not only with respect to the markets to which the losing network does not have such access but also with respect to all other markets in which it does have such access, as well as a loss of prestige with both advertisers and advertising agencies. The handling and placing of nearly all national network advertising is controlled by a limited number of agencies. The appraisal and judgment of these agencies of the respective abilities of [fol. 286] competing networks to afford the desired continuous access to markets is frequently a determining factor in the choice of networks and, by reason of their great interest and their continuous and competitive activities in the field, such agencies are intimately familiar with the facts and circumstances bearing on such access in connection with each network. In addition, there are several trade journals wholly or largely devoted to the broadcasting industry, including *Broadcasting*, *Variety* and *Radio Daily*, which circulate among all advertising agencies and, to a large extent, among national and prospective national advertisers, which trade journals regularly report, as items of news interest to their readers, the acquisition or loss of business by any national network organization, and frequently the reasons therefor, with corresponding enhancement or impairment of the prestige of the network involved, and with corresponding effect on its ability to retain existing business and to obtain further business.

7. *Competitive use of such factors by National and Columbia in representations to agencies and advertisers.* At all times since shortly after the organization of the Mutual network, and particularly since it became a nation-wide network, National and Columbia, in competing with Mutual for the business of national advertisers, have made, and have caused their salesmen, representatives, and agents to make, representations to advertising agencies and advertisers that, because of their contracts with affiliates in markets adequately served by less than four full-time stations, needed or desired by the advertiser,

a) Mutual is unable to provide any access at all in certain of such markets, either at the outset or in case of expansion;

b) Mutual is unable to provide access on an assured continuous basis in a number of other of such markets during the more desirable hours, or the hours usually needed or desired by the advertiser;

c) Any such access as Mutual can obtain for a network commercial program in the class of markets last mentioned during the more desirable hours, or the hours usually needed or desired by the advertiser, will be subject to discontinuance or to shift on 28 days' notice at the demand of National or Columbia (as the case may be), with the attendant inconveniences, resorts to transcriptions and less favorable hours, loss of investment and audience, and other disadvantages heretofore pointed out.¹⁵

¹⁵ In certain instances, examples of which are pointed out below, this representation has been accompanied by specific threats on the part of National's Blue Network that all, or an important part, of the precise time desired by the advertiser on stations in such markets would be preempted by National under its option-time privileges for another specified advertiser who was ready and willing to use the time for a network commercial program over the Blue Network. The cities in which are located stations jointly affiliated with National or Columbia and Mutual, but in which Mutual's access is subject to the restrictive contract provisions in favor of National or Columbia, are as follows:

Cleveland, O.
Houston, Texas
Memphis, Tenn.
Birmingham, Ala.
Omaha, Neb.
Richmond, Va.
Jacksonville, Fla.
Des Moines, Iowa
Salt Lake City, Utah
Bridgeport, Conn.
Tulsa, Okla.
Spokane, Wash.
Charlotte, N. C.

Harrisburg, Pa.
Binghamton, N. Y.
Evansville, Ind.
Manchester, N. H.
Augusta, Ga.
Cedar Rapids, Iowa
Lancaster, Pa.
Corpus Christi, Texas
York, Pa.
Columbia, S. C.
Bangor, Me.
Weslaco, Texas
Shenandoah, Iowa

In all but 3 instances, the stations in question are affiliated with National.

d) Advertisers who have used the Mutual network in the past have been subjected to such handicaps and disadvantages and, as a result, have left the Mutual network and have placed their business with National or Columbia.

Such representations have caused, and are continuing to cause, Mutual to lose the business of national advertisers who have placed their business with National and Columbia and who, as affiant is informed and believes, would otherwise have placed their business with Mutual. The situation has arisen much more frequently in Mutual's competition [fol. 288] with National's Blue Network, than with National's Red Network or Columbia because National has been able to sell only a comparatively small amount of the time it has had under option over its Blue Network affiliated stations and such stations consequently have a much larger amount of time available during their more desirable hours for the programs of another network, and a much greater need for revenue and a corresponding desire and interest in having such use made of their time, than is true of most of the Red Network and Columbia affiliated stations. As is hereinafter set forth in detail National has, usually in the interest of its Blue Network, from time to time actually exercised its option-time privileges under its contracts with affiliates in markets such as those which have been described so as to force advertisers who were theretofore using the Mutual network to take their business and their programs from Mutual and to place them with National, either because the advertisers were blocked from further desired expansion for their programs, or because they were completely denied access to markets needed or desired by them, or because of having to shift their programs to delayed broadcasts by transcription. The result has, on occasions, been simply that, with respect to such markets, the same advertiser with the same program would continue the use of the same stations at the same hour, but to do so was forced in other markets to use National's Blue Network instead of the Mutual network. In addition to the representations above described, National, in order to induce advertisers to use its Blue Network, (a) has given them the benefit of a system of large discounts made possible only by its very profitable operation of the Red Network, (b) has assured such advertisers that, if they will use the Blue Network, they will be given the benefit of the first opening of

suitable time that develops on its Red Network, and (c) has given such advertisers the benefit of a combination of the better stations affiliated with both the Red and the Blue Networks, all of these being competitive advantages for National possible only because of its ownership and operation of two supposedly competing national networks.

8. *Representations with respect to effective date of the Commission's Regulations.* In addition to the representations summarized in the preceding paragraph, as affiant is informed and believes, National and Columbia are, and ever [fol. 289] since the Commission's Order of May 2, 1941, have been, making, and causing their salesmen, representatives and agents to make, representations to advertising agencies, to national advertisers, and to their affiliates, that, by reason of proceedings which they proposed to institute in court (including these pending proceedings), the Commission's Regulations would not go into effect in less than two or three years (if at all) and that during such period of time affiliates may safely enter into or renew contracts with National or Columbia containing provisions such as those forbidden by the Regulations, and national advertisers cannot place their business with Mutual without being subject to the hardships and inconveniences already described. As a result of such representations, coupled with the successful exercise by National of its option-time provisions within the past two months to its advantage and at the expense of Mutual, all as hereinafter more fully set forth, Mutual has lost business of vital importance to its continued success, and is immediately threatened with the loss of further such business, and, unless the Regulations are permitted to go into effect, affiant fears it will continue to lose such business to a point where its existence will be endangered.

9. *Current and past examples of loss of business by Mutual because of the restrictive contracts.* (a). *The Ballantine Program.* In June, 1941, after extensive efforts and outlay, Mutual secured, and entered into, a contract with J. Walter Thompson Company, one of the leading advertising agencies, acting in behalf of its client, Ballantine & Sons, brewers of ale and beer, for the broadcasting of a network commercial program over 77 stations affiliated with Mutual at the scheduled hour 9:30 p. m. to 10 p. m. (New York City time) on Friday nights, for the usual period of

52 weeks, commencing in September, 1941, cancelable on four weeks' advance notice at the end of any 13-week cycle. The program which was proposed to be broadcast, and which was thereafter broadcast, was of outstanding audience appeal and was of a character and quality of excellence such as to contribute greatly to the prestige of Mutual and its affiliates, with a heavy cost of production for the advertiser and featuring popular and well-known artists and talent such as Charles Laughton, Milton Berle, Shirley Ross, and Bob Crosby's Orchestra.

Included among the 77 stations were 14 in cities adequately served by less than four full-time stations. All 14 [fol. 290] stations were (and are) affiliated with National under contracts containing network option-time clauses above described. The call letters, location and network affiliation (other than with Mutual) of these stations were and are as follows:

WHK	Cleveland	Blue Network
WTAG	Portland	Red "
WCSH	Worcester	Red "
WTIC	Hartford	Red "
WICC	Bridgeport	Blue "
WMFE	Plattsburg	Blue "
WGAL	Lancaster	Red and Blue Networks
WORK	York	Red and Blue "
WJHP	Jacksonville	Blue Network
WEAN	Providence	Blue "
WKBO	Harrisburg	Red and Blue "
WKAT	Miami	Blue Network
WLBZ	Bangor	Red and Blue "
WXYZ	Detroit	Blue Network

It was necessary for the 14 stations to accept the Balantine program subject to the exercise by National of its privilege under the network option-time provisions to preempt the time on 28 days' notice.

On or about September 15, 1941, 10 of the 14 stations notified Mutual they could not continue to broadcast the Balantine program after October 10, 1941, at the scheduled hour (namely, from 9:30 to 10:00 p. m. on Friday evenings) because that time was subject to option by National and National had exercised its option for the broadcasting of a program sponsored by the Canada Dry Company. The

stations advised Mutual that on and after October 10, 1941 the program would have to be broadcast by them through the use of transcriptions at a later hour (meaning another day in most instances), which substitute time, to be satisfactory to the advertiser (that is, in equally desirable hours), would necessarily be at an hour likewise subject to preemption by National on exercise of its option privileges. National's action in exercising its option worked to the injury of the 10 affiliates in that not only did they have to accept a lower basis of compensation from National than from Mutual but the Canada Dry program was for 25 min-[fol. 291] utes instead of 30 minutes, thus further reducing their compensation.¹⁶

On October 23, 1941 Mutual was notified in writing by J. Walter Thompson Company that the agency was canceling the Ballantine program effective after the broadcast on October 31, 1941. A copy of this letter and enclosure is attached hereto as Appendix G. Since the contract was binding for a 13-week period ending December 5, 1941, the agency offered to compensate Mutual for time from October 31, 1941 to December 5, 1941, without making use of the Mutual network if Mutual would not release the agency from its obligation. The amount thus to be paid to Mutual was \$27,711.75 for the five weeks involved, plus an additional \$17,984.20, because of the inapplicability of the short rate, resulting from broadcasting only eight weeks instead of 52 weeks. This amount constituted approximately 16 per cent of the total amount that Ballantine would have been called upon to pay to Mutual under its contract for the 52-week period, and, in the absence of any rate concession made by National to the agency or the advertiser, is indicative of the value placed by them upon the continued and assured access which National was able to provide to the markets in question.

Prior to soliciting and procuring the Ballantine account, National had not accepted any beer or liquor advertising over either its Red or Blue Networks for several years, and

¹⁶ Affiant is informed and believes that the primary reason the Canada Dry Company scheduled its program with National rather than with Mutual was that Mutual could not assure continuous access to the markets served by these 14 stations at an hour acceptable to the advertiser, whereas National was in a position to do so.

had allowed it to be understood that it was its regular policy not to accept such advertising. To secure the Ballantine program, therefore, and to deprive Mutual thereof, National introduced a major change in its policy, at least for the Blue Network. On information and belief, affiant further states that, as an additional inducement to the advertising agency, National informed it that if Ballantine would make use of the Blue Network it would have the privilege of transferring to the Red Network as soon as time thereon [fol. 292] should become available and National should decide to accept such advertising on the Red Network.

On October 27, 1941, Mutual was advised by J. Walter Thompson Company, both orally and by letter, that the Ballantine program would continue over Mutual for the remainder of the 13-week period, thus rescinding the cancellation as of October 31, but canceling the program as of December 5, 1941. A copy of the letter and enclosure, both dated October 27, 1941, is attached hereto as Appendix H. Since that date the program has been discontinued on the Mutual network and has been broadcast over National's Blue Network. Mutual's loss of the program has entailed not only loss to it and to its affiliates of the very substantial revenue involved for the remainder of the original contract period and any renewals thereof which the agency and the advertiser might otherwise have agreed to, but also the loss of a very important and popular program and of the audience resulting therefrom, as well as a corresponding loss of prestige among advertising agencies, advertisers, and actual or prospective affiliates. To illustrate the wide publicity attendant upon such an occurrence, affiant refers to news items appearing in the trade magazine *Broadcasting* for October 27, 1941, at page 50, and in the trade magazine *Variety* for October 29, 1941, at pages 31 and 38, copies of which are set forth in Appendix I.

(b) *The March of Time Program.* In June, 1941, Mutual entered upon negotiations with Time, Inc., publishers of *Time Magazine*, for the broadcasting over the Mutual network of a program known as "March of Time". This program had been formerly on the Columbia network, but had not been broadcast for some two years. Mutual was given to understand by the representatives of Time, Inc., that during the coming year the Mutual network would be used for the purpose. Thereupon, as affiant is informed and believes, officials of National proceeded directly to the rep-

representatives of Time, Inc., and told the latter, in substance, that if Time, Inc., placed its program on Mutual, National, through the exercise of its option privilege to preempt broadcasting time of affiliate stations, would see to it that the "March of Time" program would be either eliminated from stations in a number of important markets or, in the alternative, forced to delayed broadcasts by transcription. More specifically, as affiant is informed and believes, National's said officials represented that National had an order [fol. 293] from a concern known as the Clark Candy Company which could be applied to the precise half-hour in question (8:00 p. m. to 8:30 p. m. on Thursday nights) and that, after "March of Time" went to Mutual, the Clark Candy program would be used for the purpose of such elimination, but if the "March of Time" program would use National's Blue Network the Clark Candy program would be moved to, and scheduled on, the half-hour immediately following. As the result of said representations by National officials, Time, Inc., purchased time on the Blue Network of National and has been using said network since early in October, 1941, and the Clark Candy program has been scheduled for the half-hour immediately following. National's scheduling of the program for Time, Inc., represented a distinct change in its theretofore publicly announced policy against dramatization of war scenes and impersonations of world figures, as well as its policy against the use of recordings on network programs. In illustration of the publicity attendant upon the change of policy, affiant refers to a reprint from the trade magazine *Broadcasting*, October 13, 1941, page 66, a copy of which is attached hereto as Appendix J.

(c) *The Lucky Strike Program.* Approximately three years ago, Mutual secured the American Tobacco Company as sponsor for a regular weekly program advertising its product, Lucky Strike Cigarettes. The program was Kay Kyser's "College of Musical Knowledge," and had been previously broadcast over the Mutual network as a sustaining program. Because of the popularity of the program and its satisfactory return to the advertiser after a period of about 13 weeks, the advertiser desired to expand the program to reach additional markets but, because of the restrictive contracts of National and Columbia, Mutual was unable to meet the advertiser's needs. The advertiser thereupon discontinued use of Mutual and placed the pro-

gram on National, over which it is still being broadcast under the same name and with the same general character. For the same reason, the advertiser transferred a program "Melody Puzzles" from Mutual to National's Blue.

(d) *The "True or False" Program.* Shortly after Mutual's experience with the Lucky Strike program, Mutual secured the J. B. Williams Company as sponsor for a regular weekly program known as "True or False," at first [fol. 294] broadcast over a few stations and gradually expanding to more stations, including several also affiliated with National's Blue Network under restrictive contracts. National thereafter exercised its option-time privileges to force such stations to broadcast another network commercial program in the time required for "True or False" and, as a result of the hardships and inconveniences caused thereby, the advertiser discontinued the program on Mutual and transferred it to National's Blue Network, over which network the program has ever since been, and is still being, broadcast, on the same evening (Monday) every week.

(e) *The "Don't You Believe It" Program.* In 1939, because of the exploitation by National of said restrictive contract provisions to prevent expansion of the program to other stations and to force stations already broadcasting the program to discontinue or shift it to a delayed broadcast by transcription, Mutual lost the program "Don't You Believe It," sponsored by P. Lorillard & Sons, to National's Blue Network.

(f) *The "Famous Jury Trials" Program.* In 1938-1939, because of the exploitation by National of said restrictive contract provisions to force stations already broadcasting the program to discontinue or shift it, Mutual lost the program "Famous Jury Trials," sponsored by Mennen's. The sponsor went to a combination of Blue and Red stations.

(g) *The Phillip Morris Program.* In 1939, because of Mutual's inability to provide expansion into additional markets on an assured continuous basis because of National's restrictive contracts, Mutual lost a program sponsored by Phillip Morris & Company, and theretofore broadcast over the Mutual network, to National's Blue Network.

(h) *The "Goodwill Hour" Program.* Early in 1940, because of the exploitation by National of its restrictive contract provisions to force stations to discontinue or shift the

program, Mutual lost the program "Goodwill Hour," previously broadcast over its network, to National's Blue Network, over which network the same program is still being broadcast regularly on Sunday evenings.

(i) *General.* The foregoing, while including the principal examples of network-commercial programs known by affiant to have been lost by Mutual because of National and Columbia's said restrictive contract provisions, is by no means a complete list. Throughout its existence, Mutual has regularly competed with National and Columbia for each new or prospective national advertiser, as far as known to it, and in the course of this competition a number of such advertisers have placed their business with National or Columbia under circumstances which, so far as known to affiant, indicate that factors based on the restrictive contract provisions either were determinative or contributed substantially to the result.

10. *Apprehended loss of further business by Mutual.* (a) *The Coca-Cola Company Program.* In September, 1941, Mutual entered into a contract with the D'Arcy Advertising Agency, acting in behalf of its client, Coca-Cola Company, for the broadcasting of a commercial network program over 118 stations affiliated with Mutual five nights a week from 10:15 to 10:30 p. m., and the sixth night from 10:15 to 10:45 p. m. This contract was secured after long and arduous negotiations in competition with National and Columbia, during which National sought to persuade the agency to use National's Blue Network on the representation that if Mutual were used the program would either be eliminated from certain stations or forced to a delayed broadcast by transcription at a less desirable hour. Nevertheless, for reasons having to do with the merits of the respective networks, Mutual was able to persuade the agency and the client to contract with Mutual. Mutual, furthermore, called the attention of the agency and the client to the Commission's Order of May 2, 1941 and the accompanying regulations in answer to the representations made by National, and it is affiant's information and belief that, if it had not been for its so doing, the account would have gone to National. This account is the largest piece of business Mutual has had in its history and, so far as is known to affiant, it is the largest piece of business advertising a single product by any network. It represents over \$2,250,-

000 gross billing annually. The program was scheduled to, and did, start November 3, 1941.

As soon as the fact became known that Mutual had secured the contract, National made *dedoubled* efforts to deprive Mutual thereof through exploitation of its option-time contract provisions. Within 48 hours after Mutual had notified its affiliated stations of the Coca-Cola order, [fol. 296] National, which had previously been competing for the same program at the same or other hours, entered into contracts with one of the leading and best known advertising agencies for the broadcasting of two nationwide network commercial programs on Monday and Wednesday evenings from 10 p. m. to 10:30 p. m. for a large national advertiser, a manufacturer of drugs. Upon information and belief, affiant states that these specific hours were chosen primarily, if not entirely, to enable National to interfere with the broadcasting of Mutual's Coca-Cola program by stations having contracts with National. In any event, the result was that, on or about October 1, 1941, and thereafter, such stations were notified by National that National was exercising its option with respect to the two said half-hours beginning October 20 for two programs, the character of which said stations apparently had no knowledge. Because of such notifications from National, several such stations have been compelled to reject the Coca-Cola program, including stations at Tulsa, Okla., Birmingham, Ala., Houston, Tex., and Spokane, Wash. A number of other stations, however, similarly under contract with National, such as stations at Providence, R. I., Bridgeport, Conn., Richmond, Va., Cleveland, O., Charlotte, N. Car., Memphis, Tenn., Jacksonville, Fla., Ogden, Utah, and Des Moines, Ia., relying upon the Commission's regulations of May 2, 1941, as revised October 11, 1941, have declined to accede to National's demands. Due to the number and importance of such cities, together with the other cities on the Mutual network, the advertiser has not left Mutual. Affiant believes and states the fact to be that, if the effective date of the regulations is postponed for any substantial period of time and National is permitted to compel these stations to adhere to their existing contracts, Mutual will lose this account. The client is unwilling, and has expressly stated its unwillingness, to take any station which does not broadcast the program all six evenings of the week on a live basis at the time scheduled (rather

than by transcription), as otherwise the effectiveness of the particular advertising campaign of the client would be greatly impaired.

To illustrate the extremely unfavorable publicity which has already attended National's efforts to deprive Mutual of this program, affiant refers to articles appearing in *Variety*, October 8, 1941, at page 24, and *Broadcasting*, October 13, 1941, at page 14, copies of which appear in Appendix K.

[fol. 297] (b) *The Bayuk Cigar Company Program*. The Ivey and Ellington Agency, in behalf of its client, the Bayuk Cigar Company, has been a regular user of the Mutual network, purchasing initially three one-quarter hours and now using five one-quarter hours a week. In all of the important markets where there are only three stations, the advertiser has been compelled to accept delayed broadcasts by transcription. Within the last two months the advertiser has notified Mutual of its intention to discontinue the use of the Mutual network and to purchase the Columbia network because of the large number of delayed broadcasts by transcription to which the advertiser has been subjected over the Mutual network (due to National having exercised its privilege under option-time contracts and having placed other network commercial programs in the time used by the advertiser over such stations). The advertiser contemplated adding another broadcast period a week to its schedule. It was unwilling to accept any delayed broadcasts by transcription and insisted upon assured time as scheduled. In view of the Commission's action of October 11, 1941 and relying thereon, Mutual assured the advertiser that, if it would purchase 8:00 to 8:15 on Friday night, which was currently unused by National's Blue Network on its affiliate stations, Mutual would be able to provide Bayuk with uninterrupted broadcasting at the scheduled time. As a result, the advertiser has renewed its contract and has added the additional one-quarter hour. If the option-time privilege is successfully exercised by NBC on any of these stations, the advertiser will definitely exercise its right of cancellation with the Mutual network, and Mutual and its affiliates will lose the program.

(c) *General*: The loss of the Cocoa-Cola and the Bayuk Cigar Company programs, or either of them, would greatly and irreparably injure Mutual and its affiliates from the

point of view of both revenue and prestige. Mutual has, at present, a total of $14\frac{1}{4}$ hours a week sold for network commercial programs over stations under contract with National or Columbia, within periods of time embraced by option-time provisions in those contracts, in markets regarded as essential by advertisers. As long as the restrictive contracts are permitted to be maintained in force, Mutual is subject to the continuous hazard of losing all or [fol. 298] any portion of these programs. The figure constitutes a very considerable portion of Mutual's total of network commercial programs and the loss of all or any very large portion of the $14\frac{1}{4}$ hours a week would be fatal to Mutual's continued existence as a national network. Furthermore, until the Commission's Regulations go into effect, Mutual will be virtually unable to sell any more time for commercial network programs during the more desirable hours, namely, those covered by National's option time provisions. Representatives of three of the largest advertising agencies in the country, handling a very large and important volume of national advertising, have expressly stated to Mutual that they will not purchase time over Mutual for any client of theirs in such hours unless and until Mutual can give assurance with respect to continued clearance of the scheduled time equal to that which National or Columbia is able to give.

11. *Effect on Mutual's ability to secure and retain desirable affiliates.* Loss of business and the consequent loss of prestige such as Mutual has already suffered because of the restrictive contract provisions, and such as is threatened if those provisions are kept in force, has a serious adverse effect on Mutual's ability to secure and retain affiliate stations located in important markets and necessary to its successful operation as a national network. Under contracts between Mutual and its affiliates, the affiliates directly or indirectly bear the expenses of wire-lines necessary to link their stations with the Mutual network and, if the revenue received by an affiliate from Mutual drops below this expense (as is already the case in a number of instances), the affiliate tends to, and will, if the drop is substantial, terminate his affiliation with Mutual and thus deprive Mutual of an outlet in the market served by his station. In certain other instances where the affiliate's station has, for example, better coverage or a larger audience than

the station affiliated with National's Blue Network serving the same market, Mutual will be unable to retain the affiliate as against the Blue Network and will be forced to accept a less desirable affiliate. Generally, the national network organization which is able, through volume of business or otherwise, to provide the larger revenue (subject to the qualification that it also provides the affiliate with a good continuous program service, commercial and sustaining), is [fol. 299] able to secure the station with the better coverage and the larger audience in any community, and to force the station to accept the maximum of whatever restrictions by way of exclusive option-time are permitted. Mutual, because of its smaller volume of business, is already under a heavy handicap in this respect, in competing for affiliates with either National's Red Network or Columbia's network, and is under somewhat of a handicap in competing for affiliates with National's Blue Network. Further loss of revenue will irreparably injure Mutual in this respect.

VI

Lack of Injury to National and Columbia Through Immediate Enforcement of Regulations

1. *Discussion limited to certain Regulations.* Affiant's discussion will be confined primarily to Regulations 3.101, 3.103, and 3.104, having to do respectively with network exclusivity, length of contract, and option-time. By their language, and the provision made by the Commission for such extensions of time as may be necessary, Regulation 3.106, having to do with network ownership of stations, and Regulation 3.107, having to do with the operation of two supposedly competing networks by one organization, do not appear to have or threaten any immediate effect on either National or Columbia. Columbia's complaint does not seek relief against either of said Regulations or Regulation 3.108. Throughout its existence and without difficulty, Mutual has operated in conformity with Regulations 3.105 and 3.108, having to do with the affiliate's right to reject network programs and to fix its own rates on non-network commercial programs. Regulation 3.102, having to do with station exclusivity, obviously cannot operate to the injury of a network, but is of importance in a consideration of the effects of Regulations 3.101 and 3.104 and will be discussed incidentally in connection therewith.

2. *No adverse effect in cities adequately served by four or more full-time stations.* Apart from, and in addition to, the facts and circumstances recited in later paragraphs under this heading, Regulations 3.101 and 3.104, forbidding network exclusivity and restricting the use of option-time, cannot have any appreciable adverse effect on either National or Columbia in any city adequately served by four or more [fol. 300] full-time stations. In each such city, each of the four national networks (National's Red, National's Blue, Columbia, and Mutual) already has its regular full-time affiliate, and there will be no occasion or tendency on the part of any one of these networks to attempt to make use of a station affiliated with any of the others. It is very important to any network that, so far as possible in any city, it have a regular affiliate, (a) known and advertised to the public as such, available not only for its network commercial but also its network sustaining programs, (b) interested in promoting the network and securing business and goodwill for it, and (c) in a position to cooperate with the network in providing programs or facilities for securing programs originating in that locality. The network organization will willingly and regularly accept a station with smaller coverage as its regular affiliate in preference to sharing the time of a station with greater coverage with another network, and will willingly and regularly contract to give such station first call on its programs as permitted by Regulation 3.102. That a form of contract complying with the Regulations and at the same time preserving this right of first call in a manner satisfactory both to networks and to affiliates, can easily be worked out and formulated, has already been demonstrated by Mutual in the contracts which it has drafted for this purpose, hereinbefore described. Each network having given first call on its programs to its respective affiliates, clearly there can be no such effects in such cities resulting from the operation of Regulations 3.101 and 3.104 as are stated or implied in the affidavits of Mr. Trammell and Mr. Paley. The unlikelihood of any complication arising from an attempt to create an "advertising super-network", is separately discussed below.

3. *No adverse effect with respect to time already in use for network commercial programs.* Nothing in the Commission's Regulations prevents, or interferes with, the carrying out by each network organization of any and all

contracts with advertising agencies and advertisers for the use of any and all time now being used, or contracted to be used, over affiliated stations, for network commercial programs. This is true regardless of the amount or proportion of any station's time now subject to such contracts, regardless of the length of the period of time covered thereby, and regardless of the number of stations rendering adequate service to a given city. Since virtually all such contracts are for a period of 52 weeks, and since ordinarily they expire in the early fall, the network commercial programs currently being broadcast thereunder over the National and Columbia networks will not, in the overwhelming majority of instances, be subject to disturbance or displacement in favor of the programs of another network or in favor of any non-network program earlier than the fall of 1942. Even then, due to the likelihood that the advertiser will desire to renew his contract for a further period of 52 weeks, due to the great interest, both financial and by way of prestige, which he, the affiliate, and the network have in such renewal, and due to the fact that, by reason of his continued use of such time, it will be clear for such purpose, the overwhelming probability is that it will be renewed over the same network and the same affiliate stations. In other words, neither the prohibition against network exclusivity nor the restrictions on option-time can have any adverse effect on time now already used over any station for National or Columbia network commercial programs. By the same token, but due to the Regulations becoming effective, time now actually in use over any station for Mutual programs cannot, during the period of the contract with the advertiser, be preempted for a new commercial program offered by another network.

4. *No adverse effect from limitation of option time to three hours per segment.* Passing over, for the moment, the requirement of Regulation 3.104 that option time provisions must henceforth be non-exclusive as between networks, affiant points out that, in the light of the undisputed facts, no adverse effect can result to National or Columbia from the limitation of network option-time to three hours per segment. Affiant states that, in the light of his experience, the Commission's division of the day into four segments (8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m. and 11 p. m. to 8 a. m.) corresponds as nearly as is practi-

cable, without undue complications of detail and with due regard for differences in time zones across the country, to the recognized and generally accepted listening habits of the public, the evaluation of the hours of the day as to relative desirability from the point of view of advertisers and the various classes thereof, and the needs for time on the part of non-network advertisers, for sustaining programs, [fol. 302] and for purposes of programs of a local and regional character. The reservation by the Commission of anything over three hours in each segment free from network option corresponds very closely with actual practice in the case of those networks having the largest volume of network commercial programs, namely, National's Red Network and Columbia, and their affiliate stations. While in a few segments per week, one or the other of these networks may have slightly over three hours in actual use on some evenings on some (but by no means all) of their affiliate stations, the average actual use is substantially less than three hours per segment, and in those few instances where it is not, nothing in the Commission's Regulations prevents the continuance of such use under existing contracts with advertisers, or, with the consent of the stations involved, the renewal of such contracts.¹⁷

5. *No adverse effect from prohibition of option-time exclusive against other networks.* As affiant has already shown, in cities adequately served by four or more full-time stations, the restrictions imposed by Regulation 3.104 (as well as Regulation 3.101) cannot, as a practical matter, have any adverse effect on either National or Columbia. Affiant will now show that, so far as any legitimate purpose of option-time is concerned, the same is true in cities adequately served by less than four full-time stations.

Because of the inherent characteristics of network broadcasting, including virtually instantaneous transmission

¹⁷ In the morning segment, from 8 a. m. to 1 p. m., National, under its existing contracts, on both its Red and Blue Networks, has an option only on two hours (from 10 a. m. to noon), and in the afternoon segment, from 1 p. m. to 6 p. m., only three hours, (from 3 p. m. to 6 p. m.). Its evening option is 3½ hours (7 p. m. to 7:30 p. m. and 8 p. m. to 11 p. m.). It has no option on time between 11 p. m. and 8 a. m.

over wire-lines to all parts of the country and simultaneous broadcasting by many stations of the same program, it is highly important, as a business convenience, that obstacles to the necessary clearance over the desired stations be eliminated so far as practicable. These obstacles, however, consist primarily in the scheduling by individual stations of *non-network* programs (local or national spot) at various hours, and, in the absence of provision for clearance of time against such programs, make it necessary for the network to consult, and in some instances, negotiate, for clearance of the time desired for a particular network commercial program. Such obstacles are not insuperable, as has been demonstrated by the operation of the Mutual network without option-time from its establishment in the fall of 1934 until early in 1940, and even since then with respect to a large number of its affiliates, as well as by the operation of National's networks without option-time to any substantial degree until after 1935. Regulation 3.104, however, permits option-time affording adequate and entirely sufficient clearance for three hours per segment against all obstacles.¹⁸

By reason of their large existing use of the more desirable hours in each segment, the fact that existing contracts with advertisers are not disturbed by the Regulations, and the fact that each affiliate will desire to, and will, obtain first call upon the programs of any network with which it is affiliated, neither National's Red Network nor Columbia can possibly suffer any appreciable adverse effect from the restriction under discussion. Their respective affiliates

¹⁸ Mr. Trammell's statement is his affidavit (page 20) is, in the light of the facts above stated, completely without foundation:

"Consequently, if optional time is prohibited, each and every advertising contract negotiated for such hours on the Red network would require negotiation by NBC with a minimum of 44 stations. In the normal course of its business, each of these stations would, under the Commission's amended Order, be scheduling the programs of other networks. Despite these conflicting demands, therefore, NBC would have to obtain the unanimous consent of not less than 44 persons, firms and corporations for each program scheduled."

in cities having less than four full-time stations will desire to remain their affiliates and to have first call on their programs. The case is somewhat different with National's Blue Network which, by reason of its smaller volume of business, is actually making use of only part of the time of its affiliate stations which National has under option. It will be adversely affected in that in cities served [fol. 304] by less than four full-time stations, with respect to those hours which it now has under option but has not been able to sell to any advertiser, it will (if the Regulation goes into effect) henceforth be deprived of its power to prevent its affiliates in such cities, at their discretion, from accepting and assuring the continuous broadcasting at the scheduled hour of network commercial programs provided by another network. In other words, National will, with respect to its Blue Network, be unable to exploit network option-time as a device to prevent or eliminate competition by another network, as distinguished from the legitimate purpose of option-time to provide simultaneous clearance over a number of stations as against non-network programs.

The prohibition against exclusive options will neither introduce nor lead to any appreciable confusion, difficulty in clearance, or necessity for negotiating with a number of stations as a prerequisite to entering into a contract with an advertiser. Each national network organization knows, and continuously maintains up-to-date information on, the use made by each of its affiliates of all time likely to be in demand for network commercial programs, and, in the case of cities adequately served by less than four full-time stations in which its affiliates may be serving also as the affiliate for another network, knows, and continuously maintains up-to-date information on, all time used over the station by the other network. Prospective national advertisers desiring new network commercial programs, or programs in addition to those already being broadcast, are not numerous and usually appear or become available singly and at the rate of only a very few per year. In all but a tiny fraction of cases, all four national network organizations know of each prospect and actively compete for his business. Since most of the more desirable hours, particularly in the evening, are already in use over National's Red Network and Columbia, in most instances the competition is reduced to being between National's Blue Network and Mutual, each of which endeavors to provide the advertiser

with access to the markets desired by him and in so doing offers access to the *same* stations in many cities (already enumerated) adequately served by less than four full-time stations. Once the time in question over these stations is sold to the advertiser by one of these networks, it is, of course, unavailable over these same stations to the other network for the period of the contract with the advertiser [fol. 305] (in the absence of exclusive option-time provisions in favor of the other network, such as are now exploited by National), but this is no more a disadvantage to one network than to the other, and is no more an injury to one advertiser than another, and cannot rightly be considered an injury to anyone, much less to broadcasting as an advertising medium. If it be deemed an injury to one network, it is relatively slight and is more than counterbalanced by the benefit to the affiliated stations and their audiences, and by the benefits resulting from active and fair competition on the merits of the competitors.

6. *No adverse effect from limitation of call period to 56 days.* So far as affiant knows, in all existing contracts of National and Columbia, the options may be exercised on not less than 28 days' notice. The increase in this call period to 56 days will not, in affiant's opinion, have any appreciable effect, adverse or otherwise. The time required for arranging the details of producing the program and the fact that in most instances a program to be broadcast during a given year, usually beginning in the fall, is actually contracted for more than 56 days in advance of its commencement or its renewal, will make adjustment to the new requirement a very simple matter involving no real inconvenience. Nothing in Regulation 3.104 prevents a station from accepting a network commercial program offered it on less than 56 days' notice.

7. *The apprehended "advertising super-network."* Of the various chimaeric alarms which have been conjured up to incite opposition to the Commission's Regulations, the apprehended "advertising super-network" is the most fantastic. Among the obstacles which eliminate this as a practical possibility are

a) the tremendous and uneconomic expense of leasing the necessary wire-lines (including the greatly increased pro-

portionate expense involved in leasing wire-lines for short periods weekly), and the difficulty of securing such lines reaching many important and indispensable markets,

b) the fact that such a network, in order to hold its affiliates and justify its continued existence, would have to provide a sustaining program service for its affiliates, with attendant expenses in studio, equipment, staff, engineering, promotion and publicity, all at a disproportionate cost,

c) the fact that on almost all the stations that would be necessary to constitute such a network, virtually all their desirable hours are now in actual use either for network commercial programs, or for non-network commercial programs (local or national spot), providing a greater revenue than could possibly be provided by the "super-network" advertisers,

d) the unwillingness of the owners of stations such as would be necessary to constitute such a network, to deal or affiliate themselves with any transient or fly-by-night venture, or any venture having an adverse effect upon the stations' total revenue.

The fact that no attempt has been made in the past to set up such a network, either in the period prior to 1935 when National had no exclusivity provisions and only inconsiderable option-time provisions in its contracts, or since 1935 during hours not subject to option or, if subject, not actually used, demonstrates that it is not a reasonable possibility. To add to the unlikelihood that the possibility has any practical significance, affiant points to the fact that the 64-station hook-up suggested for such a purpose in Exhibit I attached to Mr. Trammell's affidavit, includes, as nearly as affiant can calculate, 44 stations which are now affiliated with National's Red Network, 15 stations which are now affiliated with Columbia, and 5 stations which are now affiliated with National's Blue Network. In other words, even in the present state of affairs, National's Red Network comes very close to being the apprehended "super-network", and, if present tendencies are permitted to continue under the restrictive contracts, National's Red Network and Columbia will actually constitute such network,

to the disadvantage and eventual exclusion of all effective competitors.

8. *Apprehended diversion of advertising to other media.* The apprehension asserted in behalf of National and Columbia that the Regulations will result in diversion of advertising from radio to other media, is without foundation. As already pointed out, so far as clearance of time over affiliate stations serves any legitimate need or convenience, it is permitted by the Regulations, and the advertiser, once [fol. 307] having contracted through a network for a given period of time over a specified list of stations, will be assured (to a much greater extent than at present in the case of Mutual and to the same extent as at present in the case of National and Columbia) of continued use of the time for the period of his contract. The effectiveness of radio as a medium to reach the public cannot possibly be impaired, and should be enhanced, by enforcing the Regulations.

9. *Apprehended elimination or impairment of sustaining program service.* The charge that enforcement of the Regulations will result in elimination or impairment of sustaining program service by the networks is directly contrary to fact. To be successful in competition with other networks, each network must offer its affiliates, and through them the public, a continuous sustaining program service of excellent character and embracing varied features. The shortcomings of any one network in this respect will inevitably be reflected in loss of audience and public favor, in loss of the better affiliates in each city, and in eventual loss of the patronage of advertisers, to the advantage of such network's competitors.

10. *No adverse effect from two-year limitation on length of contracts.* Affiant is unable to perceive or anticipate any adverse effect on any network from Regulation 3.103, placing a two-year limitation on the contracts between networks and affiliates, as distinguished from the five-year term now prevailing, *except* that, in the course of competition between networks for affiliates, a shorter term may eventually conduce toward bringing about more frequent adjustments of the rate of compensation paid by the network to the station so as to provide the station with a more nearly fair and adequate share of the profits of network broadcasting. This, however, will be a slow process in any

event and will not be particularly marked or substantial during the next two years.¹⁹⁰

11. *General.* Over and above what affiant has already stated, affiant repeats and emphasizes the fact that, for the [fol. 306] usual business year in broadcasting, from September to September, virtually all business that is likely to be placed on national networks has already been placed (except for occurrences such as have already been pointed out, consisting of National's practices under its contracts and their effect on Mutual's programs). Except in the case of Mutual, where the effect is salutary, the Regulations have, and can have, no effect on existing network business for the duration of current contracts with advertisers (therefore, until September, 1942). Assertions such as are made by Mr. Trammell in his affidavit (pages 19, 21) or by Mr. Paley in his affidavit (pages 34-35) that the Regulations, either taken together or separately, will "destroy the present structure of network broadcasting" are absurd in view of the known and undisputed facts.

Fred Weber.

Subscribed and sworn to before me this 11th day of December, 1941. Edward H. Grohs, Notary Public. N. Y. County, N. Y. Co. Clk's. No. 507, Reg. No. 3972. Term expires March 30, 1943. (Seal.)

¹⁹ In this connection it should be noted, with reference to two of the affidavits filed by National, the contract of WOW, Omaha, with National expired December 2, 1941, and the contract of WHAM, Rochester, with National will expire February 1, 1942.

[fol. 360]

APPENDIX A

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power	Frequency (kilocycles)	Hour of Operation
				Day	Night	
WOR	New York, N. Y.	11,660,320		50,000	50,000	Unlimited
WGON	Chicago, Ill.	4,409,126		50,000	50,000	"
WIP	Philadelphia, Pa.	2,898,644		5,000	5,000	"
CKLW	Detroit—					
	Windsor, Mich.	2,206,867		5,000	5,000	"
WLWL	Minneapolis-St. Paul, Minn.	911,077		1,000	1,000	"
WHK	Cleveland, Ohio	1,214,943	N.B.C. Blue	5,000	5,000	"
WCLE	Cleveland, Ohio	1,214,943		500		Daytime
WOL	Washington, D. C.	937,816		1,000	1,000	Unlimited
WFBR	Baltimore, Md.	1,046,692		5,000	5,000	"
KWK	St. Louis, Mo.	1,367,977		5,000	5,000*	"
WCAE	Pittsburgh, Pa.	1,994,060		5,000	5,000	"
WGR	Buffalo-Niagara, N. Y.	857,719		5,000	1,000	"
WKRC	Cincinnati, Ohio	789,309		5,000	1,000	"
KITE	Kansas City, Mo.-Kans.	634,093		1,000	1,000	"
WHB	Kansas City, Mo.-Kans.	634,093		1,000	1,000	Daytime
WIBC	Indianapolis, Ind.	456,357		5,000	1,000	Unlimited
KFEL	Denver, Colo.	384,372		5,000	5,000	"
WSAY	Rochester, N. Y.	411,970		250	250	"
WHKC	Columbus, Ohio	365,796		500		"
WAGE	Syracuse, N. Y.	258,352		1,000	1,000	L-KFI
WHBF	Rock Island-Davenport—					Unlimited
	Moline, Ill.-Ia.	174,965		5,000	5,000	"
KFOR	Lincoln, Neb.	88,191		250	250	"

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APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
COLONIAL STATIONS							
WAAB	Boston, Mass.	2,350,514		1,000	1,000	1,440	Unlimited
WEAN	Providence, R. I.	711,500	N.B.C. Blue	5,000	5,000*	700	
WFCI	Pawtucket, R. I.						
WTHT	Providence, R. I.	711,500		1,000	1,000	1,420	
	Hartford, Conn.						
	New Britain, Conn.	502,193		250	250	1,220	
WELI	New Haven, Conn.	536,228		1,000	500	900	
WSPR	Holyoke-Springfield, Mass.	394,623		500	500	1,270	
WICC	Bridgeport, Conn.	216,621	N.B.C. Blue	1,000	500	600	
WATR	Waterbury, Conn.	144,822		1,000*	1,000*	1,320	
WNBH	Fall River-New Bedford, Mass.	272,648		250	250	1,340	
WBAE	Fall River-New Bedford, Mass.	277,648		1,000	1,000	1,400	
WLLH	Haverhill-Lowell-Lawrence, Mass.	334,909		250	250	1,400	
WBRK	Pittsfield, Mass.	49,684		250	250	1,340	
WCOU	Lewiston, Me.	38,506		250	250	1,240	
WNLG	New London, Conn.	30,456		250	250	1,400	
WBYB	Rutland, Vt.	17,082		1,000*	1,000*	1,380*	
WHAI	Greenfield, Mass.	15,672		250	250	1,240	
WLNH	Laconia, N. H.	13,484		250	250	1,340	

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DON LEE

KHJ	Los Angeles, Cal.	2,904,596	5,000	5,000*	930	Unlimited
KFRC	San Francisco-Oakland, Cal.	1,428,525	5,000	5,000	610	"
WOL	Seattle, Wash.	452,639	5,000	5,000*	1,300	"
KALE	Portland, Ore.	406,406	5,000	5,000	1,330	"
KGB	San Diego, Cal.	256,368	1,000	1,000	1,360	"
EGA	Spokane, Wash.	141,370	10,000*	10,000*	1,510	"
KMO	Tacoma, Wash.	156,018	5,000*	5,000	1,360	"
KTKC	Vincennes, Ind.	97,504	5,000*	5,000*	940*	"
KPMC	Bakersfield, Cal.	29,252	1,250	1,000	1,800	"
KFXM	San Bernardino, Cal.	43,646	250	250	1,240	8-KPPC
KDB	Santa Barbara, Cal.	34,968	250	250	1,490	Unlimited
KIT	Yakima, Wash.	27,221	1,000	1,000	1,280	"
KVOE	Santa Ana, Cal.	31,921	250	250	1,490	"
KRKO	Everett, Wash.	30,224	250	100	1,400	"
KORE	Eugene, Ore.	20,536	250	250	1,450	"
KFJI	Klamath Falls, Ore.	16,497	100	100	1,240	"
KXRO	Aberdeen, Wash.	18,846	250	250	1,340	"
KIEM	Eureka, Cal.	17,055	1,000	500	1,460	"
KGY	Olympia, Wash.	13,254	100	100	1,240	"
KMYC	Marysville, Cal.	6,646	250	100	1,450	"
KXO	Merced, Cal.	10,135	250	100	1,080	Daytime
KHSL	El Centro, Cal.	10,017	100	100	1,400	Unlimited
KVEG	Chico, Cal.	9,287	1,000	1,000*	1,290	"
	San Luis Obispo, Cal.	8,581	250	250	1,230	"

N.B.C. Blue

APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power	Day	Night	Frequency (kilocycles)	Hours of Operating
KDON	Monterey, Cal.	10,084		250*	250*	250*	1,340	Unlimited
KVCV	Redding, Cal.	8,109		250	250	250	1,250	"
KOOS	Marshfield, Ore.	5,269		250	250	250	1,250	"
KWLK	Longview, Wash.	12,365		250	250	250	1,400	"
KRNR	Roseburg, Ore.	4,924		250	250	250*	1,400	"
KELA	Centralia, Wash.	7,414		1,000	1,000	1,000	1,470	"
KWIL	Albany, Ore.	5,654		250	250	250	1,340	"
KAST	Astoria, Ore.	10,369		250	250	250	1,250	"
Northeast Group								
WJW	Akron, Ohio	349,705		250	250	250	1,340	"
WABY	Albany, N. Y.	431,575		250	250	250	1,400	"
WILM	Wilmington, Del.	188,974		250	250	250	1,450	"
WARM*	Wilkes-Barre-Scranton, Pa.	629,581		250	250	250	1,400	"
WBBC	Canton, Ohio	200,352		250	250	250	1,250	"
WKBO	Harrisburg, Pa.	173,307	N.B.C. Red, Blue	250	250	250	1,250	"
WNBZ	Binghamton, N. Y.	145,156	C.B.S.	5,000*	5,000*	5,000*	1,250*	"
WBAX	Wilkes-Barre-Scranton, Pa.	629,581		100	100	100	1,240	"
WGAL	Lancaster, Pa.	132,027	N.B.C. Red, Blue	250	250	250	1,490	"
WORK	York, Pa.	92,627	N.B.C. Red, Blue	1,000	1,000	1,000	1,350	"
WENY	Elmira, N. Y.	45,106	N.B.C. Red, Blue	250	250	250	1,250	"
WSTV	Steubenville, Ohio	37,651		250	250	250	1,340	"
WEST	Easton, Pa.	33,589		250	250	250	1,400	"
WLBZ	Ranger, Me.	29,822	N.B.C. Red, Blue	5,000*	5,000*	5,000*	620	"
WEIM*	Fitchburg, Mass.	41,824		250	250	250	1,340	"
WPAY	Portsmouth, Ohio	40,466		250*	250*	250*	1,400	"
WJEJ	Hagerstown, Md.	32,491		250	250	250	1,240	"

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WAZL	Hazleton, Pa.	38,009		250	1,450	Unlimited
WRDO	Augusta, Me.	19,360	N.B.C. Red, Blue	100	1,400	"
WFEA	Manchester, N. H.	77,665	N.B.C. Red	5,000*	1,370	"
Mid-West Group						
KOIL	Council Bluffs-Omaha, Ia.-Neb.	287,608	C.B.S.	5,000	1,290	"
KSO	Des Moines, Ia.	185,973	N.B.C. Blue	5,000	1,460	"
WLAV	Grand Rapids, Mich.	209,573		250	1,340	"
KFBI	Wichita, Kans.	127,328		1,000	1,070	"
WRBK	Rockford, Ill.	105,259		500	1,440	"
KGHI	Little Rock, Ark.	126,724		250	1,230	"
WMT	Cedar Rapids, Ia.	73,219	C.B.S.	5,000	600	"
KDTH	Dubuque, Ia.	43,592		1,000	1,370	"
KSAL	Salina, Kans.	21,073		1,000	1,150	"
KOTN	Pine Bluff, Ark.	21,290		250	1,480	"
KWFC	Hot Springs, Ark.	21,370		250	1,340	"
KWOB	Jefferson City, Mo.	24,268		250	1,240	"
KTSW	Emporia, Kans.	12,188		250	1,400	"
KGGF	Colleyville, Kans.	17,355		1,000	600	"
KBTM	Jessboro, Ark.	11,729		250	1,230	"
KMA	Shenandoah, Ia.	6,846	N.B.C. Blue	1,000	960	"
KVGB	Great Bend, Kans.	9,044		250	1,400	"
Southeast Group						
WRNL	Richmond, Va.	245,674	N.B.C. Blue	5,000*	910	"
WGH	Portsmouth-Newport News-Norfolk, Va.	323,326		250	1,340	"

Appendix A—Continued
Stations Affiliated with the Mutual Broadcasting System, Inc.
November 1, 1941

[Col. 31:]

Stations	Cities	Population	Primary Affiliations	Power	Frequency (kilocycles)	Hours of Operation
				Day Night		
WSOC	Charlotte, N. C.	112,986	N.B.C. Red	250	250	Unlimited
WSLS	Roanoke, Va.	110,563		250	1,490	
WCOB	Columbia, S. C.	89,555	N.B.C. Blue	250	250	
WCMF	Huntington-Ashland, W. Va.-Ky.	176,979		250	1,400	
WAIR	Winston-Salem, N. C.	109,833		250	1,340	
WMRC	Greenville, S. C.	34,724		250	1,400	
WRAL	Raleigh, N. C.	46,897		250	1,240	
WLVA	Lynchburg, Va.	44,641		250	230	
WBTM	Danville, Va.	32,749		250	250*	
WSTP	Salisbury, N. C.	19,037		250	1,400	
WBBB	Burlington, N. C.	12,198		1,000	920	Daytime
Southern Group						
WATL	Atlanta, Ga.	442,204		250	1,400	Unlimited
WNOE	New Orleans, La.	540,080		250	1,450	
WMPS	Memphis, Tenn.	332,477	N.B.C. Blue	1,000	1,460	
WGRC	Louisville, Ky.	434,408		250	1,400	
WBSN	Birmingham, Ala.	407,851	N.B.C. Blue	1,000	1,400	
WSIX	Nashville, Tenn.	241,769		5,000*	980*	
WJHP	Jacksonville, Fla.	185,619	N.B.C. Blue	250	1,320	
WDEF	Chattanooga, Tenn.	193,215		250	1,400	
WBIR	Knoxville, Tenn.	151,829		250	1,240	
WTSP	St. Petersburg-Tampa, Fla.	209,693		1,000	1,380	
WGBF	Evansville, Ind.	141,614	N.B.C. Red, Blue	5,000	1,280	

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WLAP	Lexington, Ky.	49,304	250	250	1,450	Unlimited
WMOB	Mobile, Ala.	114,006	250	250	1,230	..
WBML	Macon, Ga.	74,830	250	250	1,240	..
WJBY	Gadsden, Ala.	36,975	250	250	1,240	..
WTJS	Jackson, Tenn.	24,332	1,000*	1,000*	1,300	..
WALB	Albany, Ga.	19,065	1,000	1,000	1,500	..
WRUF	Gainesville, Fla.	13,757	5,000	..	850	L-KOA
WHBB	Selma, Ala.	19,534	100	100	1,490	Unlimited
WMSL	Decatur, Ala.	16,604	250	250	1,400	..
WBLJ	Dallas, Ga.	10,448	250	250	1,230	..
WDAK	West Point, Ga.	3,991	250	250	1,340	..

Southwest Group

KXYZ	Houston, Tex.	510,397	5,000*	5,000*	1,320*	..
WRR	Dallas, Tex.	376,548	5,000*	5,000*	1,310	..
KABC	San Antonio, Tex.	319,010	250	250	1,450	..
KFJZ	Fort Worth, Tex.	207,677	5,000*	5,000*	1,270	..
KOCY	Oklahoma City, Okla.	221,229	250	250	1,340	..
KOME	Tulsa, Okla.	188,532	250	250	1,340	..
KNOW	Austin, Tex.	108,193	250	250	1,400	..
KRIS	Corpus Christi, Tex.	70,677	1,000	1,000	1,300	..
KPAC	Beaumont-Port Arthur, Tex.	138,608	500	500	1,250	..
KFDA	Amarillo, Tex.	53,463	250	250	1,230	..
WACO	Waco, Tex.	71,114	250	250	1,450	..
KGKL	San Angelo, Tex.	25,902	250	250	1,400	..

Appendix A—Continued
 Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

[col. 316]

Stations	Cities	Population	Primary Affiliations	Power	Frequency (kilocycles)	Hours of Operation
KCMC	Texarkana, Tex.	28,840		Day 250 Night 250	1,450	Unlimited
KRBC	Abilene, Tex.	26,612		250	1,450	
KBST	Big Spring, Tex.	12,604		100	1,400	
KRRV	Sherman, Tex.	17,156		1,000	910	
KTEM	Temple, Tex.	15,344		250	1,400	
KRGV	Weslaco, Tex.	6,883	N.B.C. Red, Blue	1,000	1,300	
Northwest Group						
WHBL	Sheboygan, Wis.	40,308		1,000*	1,330	
WHBY	Appleton, Wis.	28,436		250	1,230	
WFHR	Wisconsin Rapids	11,416		250	1,340	
KFIZ	Fond Du Lac, Wis.	27,209		250	1,450	
WBAU	Wausau, Wis.	27,208		250	1,400	
WHDF	Calamet, Mich.	Under 5,000		250	1,400	
WDSM	Duluth-Superior, Minn.-Wis.	157,098		100	1,220	
KTRI	Stout City, Ia.	87,791		250	1,450	
KVOX	Fargo-Moorhead, N. D.	42,071		250	1,340	
KVFD	Fl. Dodge, Ia.	22,904		250	1,400	
KWNO	Winona, Minn.	22,490		250	1,280	
KGCU	Bismarck-Mandan, N. D.	22,181		250	1,270	
KABR	Aberdeen, S. D.	17,015		5,000	1,430	
KLPM	Minot, N. D.	16,577		1,000	1,300	
KATE	Albert Lee, Minn.	12,300		250	1,450	
KGDE	Fergus Falls, Minn.	10,848		250	1,230	
KRMC	Jamestown, N. D.	8,790		250	1,400	

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KDLR	Devils Lake, N. D.	6,204	250	250	1,240	Unlimited
KWLM	Willmar, Minn.	7,623	250	250	1,340	"
WJMS	Ironwood, Mich.	13,369	250	250	1,450	"
WATW	Ashland, Wis.	11,101	100	100	1,400	"
Mountain Group						
KLO	Ogden-Salt Lake City, Utah	204,488	5,000	5,000	1,430	"
KFXJ	Grand Junction, Colo.	12,479	1,000*	500*	920*	"
KFKA	Greeley, Colo.	15,966	1,000	1,000	910	S-KPOF
KOVO	Provo, Utah	18,071	250	250	1,240	Unlimited
KEUB	Price, Utah	5,214	250	250	1,450	"
Group Outside United States						
KGMB	Honolulu, T. H.		5,000	5,000	590	"
KHBC	Hilo, T. H.		250	250	1,230	"
KGBU	Ketchikan, Alaska		500	500	930	"
CKLW	Windsor, Ontario (Previously listed)					

* Construction permit only.

Notes: The affiliations and facilities above listed are corrected to November 1, 1941. City populations based on 1940 census figures, metropolitan district figures used whenever applicable. Affiliations based upon November 1, 1941 edition of Standard Rate and Data, except Mutual, whose affiliations are based upon its own files.

[fol. 318]

APPENDIX B

Comparison of Facilities of Broadcast Stations Affiliated with
the Four National Networks

(As of November 1, 1941)

Full-time Stations

	Size of City	National (Red)	National (Blue)	Columbia	Mutual
Clear Channel 50 kw.	1,000,000 up	9 ^a	3 ^a	6	2
	500,000 "	3	1	6	..
	100,000 "	6	3	8	..
	25,000 "	1	1	..	..
		19 ^a	8 ^a	20	2
Clear Channel below 50 kw.	1,000,000 up	..	2	..	..
	500,000 "	..	..	..	..
	100,000 "	1	5	5	3
	25,000 "	1	..	2	1
	10,000 "	..	1	..	1
		2 ^a	8 ^a	7	5 ^a
Regional (1 kw. to 5 kw.)	1,000,000 up	3	6	5	8
	500,000 "	8	7	5	8
	100,000 "	28	22	34	19
	25,000 "	16	20	20	9
	10,000 "	4	5	4	9
	5,000 "	..	2	1	4
	5,000 down	1	..	..	..
		60 ^a	62 ^a	69	57 ^a
Regional (less than 1 kw. at night)	1,000,000 up	..	..	..	..
	500,000 "	..	..	..	..
	100,000 "	2	5	..	7
	25,000 "	2	2	..	..
	10,000 "	1	2	..	1
		5 ^a	9 ^a	..	8 ^a
Local (100 w. to 250 w.)	1,000,000 up	..	1	..	..
	500,000 "	1	3	..	4
	100,000 "	11	12	8	24
	25,000 "	8	24	6	35
	10,000 "	12	16	6	30
	5,000 "	2	4	..	10
	5,000 down	1	1	..	3
		35 ^a	61 ^a	20	106 ^a

[fol. 319]

APPENDIX B—Continued

Comparison of Facilities of Broadcast Stations Affiliated with
the Four National Networks

(As of November 1, 1941)

Part-time Stations

	Size of City	National (Red)	National (Blue)	Columbia	Mutual
Clear Channel 50 kw.	100,000 up	1	..	..	..
		1	..	..	..
Clear Channel below 50 kw.	500,000 up	..	1	..	1
	100,000 "	..	1	..	1
	25,000 "	1	1	1	2
	10,000 "	1	1	1	2
		2 ²	3 ³	1	4
Regional (1 kw. to 5 kw.)	1,000,000 up	..	..	..	1
	500,000 "	..	1	1	..
	100,000 "	..	..	..	..
	25,000 "	..	..	1	..
	10,000 "	..	..	..	2
		..	1	2	3
Regional (less than 1 kw. at night)	1,000,000 up	..	..	..	..
	500,000 "	..	..	..	..
	100,000 "	1	1	..	..
		1 ⁴	1 ⁴	..	..
Local (100 w. to 250 w.)	25,000 up	..	..	..	1
		..	..	..	1
Total		125	153	119	186

¹ WFAA-WBAP treated as one full-time station.² WENR-WLS treated as one full-time station.³ Includes 2 stations affiliated with both Red and Blue.⁴ Includes 1 station affiliated with both Red and Blue.⁵ Includes 1 station primarily affiliated with N.B.C. Blue.⁶ Includes 19 stations affiliated with both Red and Blue.⁷ Includes 3 stations primarily affiliated with Columbia, 4 with both N.B.C. Red and Blue, 7 with N.B.C. Blue, and 2 with N.B.C. Red.⁸ Includes 4 stations on both N.B.C. Red and Blue.⁹ Includes 3 stations primarily with N.B.C. Blue.¹⁰ Includes 3 stations primarily affiliated with both N.B.C. Red and Blue, 3 with N.B.C. Blue, and 1 with N.B.C. Red.

Note.—Only stations within continental United States are considered. Population figures based upon 1940 census, with metropolitan districts used when applicable. Classifications include facilities authorized by construction permit only.

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APPENDIX C

Affiant's Letter to Mutual Stockholders, October 31, 1941

Mutual Broadcasting System, Inc.

New York Office: 1440 Broadway, New York

October 31, 1941.

To: Stockholders of the Mutual Broadcasting System:

As you are aware, the Monopoly Regulations of the Federal Communications Commission become effective on November 15, 1941. In view of the short time remaining before that effective date, we send you herewith a letter agreement modifying your existing contract with Mutual, and request that you immediately execute it and return it to us.

We are at present preparing new contracts which will embody the various changes required by the Monopoly Regulations, as well as other changes which have been discussed at our Board of Directors Meetings. These contracts will be submitted to you as soon as possible, after which the date of the next meeting of the Board of Directors will be advised.

Your cooperation in immediately returning the enclosed agreement, signed by you, to our Chicago office, attention of Mr. E. M. Antrim, will be greatly appreciated.

With kindest regards, Fred Weber.

FW:mk

Enc.

APPENDIX D

Mutual's Agreement with its Stockholders, October 31, 1941

Mutual Broadcasting System, Inc.

Branch Office: 1440 Broadway, New York

October 31, 1941.

GENTLEMEN:

Confirming the understanding between us, it is agreed that notwithstanding anything to the contrary contained in the contract between you and the Mutual Broadcasting System, Inc.,

[fol. 321] (1) The option time referred to in said contract shall be exclusive, except as against other network organizations, it being understood that notwithstanding such option time, you will not be prevented or hindered from optioning (under non-exclusive options) or selling any or all of said option time, or other time, to other network organizations. You will clear and furnish to Mutual any period or periods of time within said option time for broadcasting of any Mutual commercial network program or programs upon fifty-six (56) days' notice from Mutual, unless prior to such notice from Mutual you shall have actually made a bona fide sale to another network organization of the period or periods of time within said option time required by Mutual for the advertiser. No commitment to any other network organization made in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission shall be deemed to be a bona fide sale for the purpose of this paragraph. You may refuse to execute a commitment to furnish broadcasting time to Mutual for the broadcasting of any program or programs which you reasonably believe to be unsatisfactory or unsuitable.

(2) The provisions of said contract with regard to your exclusive association with Mutual is hereby revoked and rescinded.

(3) Any other provisions of said contract in violation of Section 3.101, 3.108 both inclusive of the Regulations of the Federal Communications Commission is hereby revoked and rescinded.

The provisions of this letter shall become effective immediately.

Except as herein specifically modified; said contract shall continue in full force and effect.

If the provisions of this letter meet with your approval will you please indicate your assent thereto by affixing your signature on each of the enclosed copies of this letter and return to our Chicago Office, attention of Mr. E. M. Antrim.

Yours very truly, Mutual Broadcasting System, Inc.,
by Fred Weber, General Manager.

FW:pwh.

Approved _____:

Date _____

Mutual's Proposed Contract to Conform to the Revised Regulations

This Agreement, made at Chicago, Illinois, as of —, 194—, between Mutual Broadcasting System, Inc., an Illinois corporation (hereinafter called "Mutual"), and — (hereinafter called the "Broadcaster"),

Witnesseth:

The Broadcaster is the owner and operator of radio station —, located at — (hereinafter called the "Station").

Mutual is engaged in the operation of a national radio broadcasting network composed of stations which are owned or operated by or affiliated with Mutual's shareholders and of other stations which are from time to time affiliated with the Mutual network. It is the intention of Mutual and the Broadcaster that the network shall remain cooperative in character, and that the stations composing the network shall retain the advantages thereof, including: effective control on the part of such stations of the acceptance or rejection of programs to the end that the public interest may be best served, full participation in the profits of network operation, the preservation of local control and ability to meet local and regional needs in the public interest, the greater geographical diversification of program-originating points, the prevention of tendencies toward monopoly and toward concentration of program control in a small group or in a particular locality, and the furtherance of the principle of competition.

The Broadcaster and Mutual are desirous of entering into an agreement, on the terms and conditions hereinafter set forth, for the affiliation of the Station with the Mutual network and for the sale by the Broadcaster and the purchase by Mutual of broadcasting time on the Station for the broadcasting of Mutual network commercial programs.

Now, Therefore, It Is Mutually Agreed as Follows:

1. Mutual will contract with the American Telephone and Telegraph Company for the maintenance by the latter, commencing on —, 194—, of a program transmission line extending to —.

[fol. 323] 2. Mutual and the Broadcaster will each publicize the Station as the regular Mutual outlet in the city in which the Station is located. The Station shall have the right to the first call on Mutual network commercial and sustaining programs in said city and Mutual shall not offer any series of programs or single program (not a part of a series) to any other radio station located in said city unless said series of programs or single program has been offered to the Broadcaster for broadcasting through the Station under this contract and the Broadcaster shall have failed or refused to accept such program or programs within forty-eight (48) hours after Mutual's offer.

(A) In the case of a commercial program or a series of commercial programs:

(1) If the Broadcaster is unable to clear the required period or periods of time on the Station for such program or programs but notifies Mutual within said 48 hours that the Broadcaster can clear a mutually satisfactory substitute period or periods and is able and willing to broadcast the program or programs by means of off-the-line recordings (made by the Broadcaster without cost to Mutual or the advertiser) during such substitute period or periods, Mutual will accept such substitute period or periods, unless the advertiser is unwilling to accept such broadcasting by the Station by means of off-the-line recordings during such substitute period or periods, it being understood that Mutual is not obligated to require the advertiser to accept such delayed broadcasting; and

(2) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs scheduled to run for thirteen weeks or more or a series of separable programs, but notifies Mutual within said 48 hours that the Broadcaster will clear said periods of time upon a specified date not later than four (4) weeks after the commencement of the series of programs, Mutual will contract for such periods of time on the Station as of the specified date upon which the Broadcaster is able to clear such periods, unless the advertiser refuses to accept such postponement of broadcasting on the Station.

If the Broadcaster fails or refuses to accept said program or programs or if the Broadcaster is unable to clear

the required period or periods of time and Mutual is unable [fol. 324] to persuade the advertiser to use a substitute period or periods or to postpone the commencement of such programs on the Station, as provided in the preceding subparagraphs, Mutual may contract with any other station located in said city for the broadcasting of said commercial program or programs.

(B) In the case of a single sustaining program or series of sustaining programs:

(1) If the Broadcaster is unable to clear the required period or periods of time for such program or programs but notifies Mutual that the Broadcaster will broadcast the program or programs by transcription at a mutually satisfactory substitute period or periods, Mutual will not offer said program or programs to any other station in said City; and

(2) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs, Mutual, in offering said series of programs to any other station in said city, will offer said series subject to recapture by the Station on one (1) week's notice to Mutual.

It is understood, however, that notwithstanding the foregoing, Mutual may make available to any other station in said city special sustaining programs of great public importance (such as, but not limited to, addresses of the President of the United States).

3. Mutual will use its best efforts to secure contracts from advertisers for the broadcasting of commercial programs through the Station, as well as through all other stations regularly affiliated with Mutual, but Mutual does not undertake to refuse any commercial programs simply because the advertiser refuses to purchase coverage in the city in which the Station is located. The Broadcaster will sell broadcasting time on the Station to Mutual for broadcasting commercial programs, and will broadcast such programs through the Station, on the following terms and conditions:

(A) The Broadcaster hereby grants to Mutual an option on the periods of time on the Station specified in Exhibit A hereto attached, hereinafter called the "Mutual option time". This option shall be exclusive, except as against

other network organizations, it being understood that the granting of this option to Mutual shall not prevent or hinder the Broadcaster from optioning (under nonexclusive options) or selling any or all of the Mutual option time, or other time, to other network organizations. The Broadcaster will clear and furnish to Mutual any period or periods of time within the Mutual option time for the broadcasting of any Mutual commercial network program or programs upon fifty-six (56) days' notice from Mutual, unless prior to such notice from Mutual the Broadcaster shall have actually made a bona fide sale to another network organization of the period or periods of time required by Mutual for the advertiser. No commitment to any other network organization made in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission shall be deemed to be a bona fide sale for the purpose of this contract. The Broadcaster may refuse to execute a commitment to furnish broadcasting time to Mutual for the Broadcasting of any program or programs which the Broadcaster reasonably believes to be unsatisfactory or unsuitable. (Mutual will use its best efforts to supply to the Broadcaster such information as it may request regarding any proposed program or programs.)

(B) If the period or periods of time on the Station required for broadcasting any Mutual network commercial program or programs are outside the Mutual option time and if the Broadcaster elects to sell such required period or periods of time to Mutual for the broadcasting of such program or programs, such time shall be sold to Mutual on the terms and conditions contained in the following subparagraphs of this paragraph, i.e., on the same terms and conditions as time within the Mutual option time is sold to Mutual.

(C) Mutual will charge each advertiser at the following rates, for broadcasting time on the Station furnished to such advertiser by Mutual:

(1) In order to encourage the use by advertisers of a greater number of stations affiliated with Mutual for the broadcasting of the advertiser's program, Mutual has established special competitive volume discounts for advertisers contracting for periods of time on a substantial num-

ber of such stations. The minimum number of stations which must be used to entitle the advertiser to such special volume discounts is, at present, 76 stations, but it is understood that Mutual may increase or decrease this minimum from time to time, if Mutual finds it necessary or desirable to do so to meet competitive conditions. Accordingly, [fol. 320] if any advertiser contracts with Mutual for periods of time on at least the number of stations then specified by Mutual as the minimum number of stations necessary to entitle the advertiser to such special volume discounts, Mutual will charge the advertiser for time on the Station at a Volume Network Rate equal to the Station's single-time rate for the period of time used on any day, in the applicable time classification, less the applicable special volume discount specified below, depending upon the number of programs broadcast by Mutual for the advertiser during a period of fifty-two consecutive weeks:

13 broadcasts—	20% discount
26 broadcasts—	25% discount
52 broadcasts—	35% discount
104 broadcasts—	40% discount
156 broadcasts—	42½% discount
208 broadcasts—	45% discount
260 broadcasts—	50% discount

No such special volume discount, however, will be allowed to any advertiser with respect to time purchased by the Advertiser under any contract for a term of less than thirteen consecutive weeks. In computing the Volume Network Rate for the programs of any advertiser, the Station's single-time rates will be deemed to be the Station's published card rates for national advertisers in effect on the date the Broadcaster executes its commitment in connection with such advertiser's programs, or the single-time rates then charged or quoted by the Broadcaster to national advertisers for time on the Station, if such rates are lower than the Station's published card rates. (It is understood that if the advertiser uses two or more fifteen-minute units on any day, the total daily amount of time used by the advertiser may, for the purpose of determining the single-time rate to be used in computing the charges to the advertiser, be treated as an uninterrupted period, and, if two or more fifteen-minute units used by the advertiser

fall in different time classifications, the single-time rates in such classifications will be averaged. Any advertiser that shall have completed two hundred sixty broadcasts during a period of fifty-two successive weeks of broadcasting at the Volume Network Rate and shall continue such broadcasting without interruption shall be entitled to receive the Volume Network Rate for 260 broadcasts for the additional [fol. 327] period of successive weeks during which the advertiser uses the same periods of time.

(2) Mutual will charge any other advertiser for time on the Station at the Station's rates for such time in effect on the date the Broadcaster executed a commitment in connection with such advertiser's program or programs, less the applicable discounts customarily allowed by the Broadcaster to advertisers.

These rates will, of course, be subject to the customary 15% agency commission to recognized advertising agencies. The term "advertiser" as used in this contract shall mean the advertiser or the advertising agency signing a contract for an advertiser, as the case may be.

(D) Mutual will pay the Broadcaster for all broadcasting time used by Mutual on the Station a net sum equal to Mutual's actual receipts from advertisers for such time, at the rates specified in paragraph (A) above, less the sum of the following:

- (1) —% of such receipts from advertisers;
- (2) Line and service charges of \$—— per month;

() License fees payable by Mutual to the American Society of Composers, Authors and Publishers and other copyright licensing organizations with respect to the broadcasting through the Station of Mutual commercial and sustaining network programs.

If Mutual is, for any reason, unable to collect the entire amount billed to any advertiser (or its advertising agency) for broadcasting time on all participating stations, the receipts for time on the Station will, of course, be deemed to be a pro rata share of the amount actually collected, the share to be allocated to the Broadcaster depending upon the number of stations broadcasting said programs, the respective time charges of such stations, and the interrup-

tions and appropriations occurring with respect to said programs.

(E) Mutual will furnish a monthly statement to the Broadcaster on or before the last day of each month setting forth the above accountings with respect to the preceding month, and will accompany such statement with the sum, if any, due the Broadcaster.

(F) The Broadcaster will sign a commitment in the form attached hereto in connection with each advertiser's pro-[fol. 328] gram or programs submitted by Mutual and accepted by the Broadcaster and, when Mutual consummates its contract with the advertiser, Mutual will sign and return the commitment to the Broadcaster. Unless Mutual gives the Broadcaster written notice that it desires to terminate the commitment, any commitment (for the sale by the Broadcaster and the purchase by Mutual of time on the Station) which is in force at the date of the termination of this contract shall not be affected in any manner by such termination of this contract, except that thereafter Mutual, in computing its payments to the Broadcaster for such time, shall only be entitled to deduct from Mutual's receipts for such time the percentages and license fees specified in paragraph (D) above, and the actual cost of the temporary line facilities necessary to deliver the advertiser's programs to the Broadcaster.

(G) Notwithstanding the execution of a commitment by the Broadcaster to broadcast any advertiser's program or programs as hereinabove provided, the Broadcaster may refuse to broadcast any such program which, in its opinion, is contrary to the public interest or the Broadcaster may substitute for any such program a program of outstanding local or national importance. The Broadcaster will give Mutual as much notice of the Broadcaster's intention to refuse any program or to substitute another program as circumstances permit.

(H) If for any reason the Broadcaster shall enter into a contract with any advertiser for the broadcasting of any Mutual program (i.e., a program being transmitted over the Mutual lines) under the provisions of which the Broadcaster, instead of Mutual, shall receive the payments made by the advertiser for broadcasting time on the Station, the receipts of the Broadcaster from such advertising shall

(for the purpose of determining the amount of the deductions provided in paragraph (D) above, but for no other purpose) be deemed a part of Mutual's receipts from advertisers for broadcasting time on the Station.

4. If Mutual's receipts from advertisers for time on the Station for any month shall not equal the sum of the deductions provided in paragraph (D) above for such month, the Broadcaster will pay Mutual the deficiency promptly upon the receipt of a statement from Mutual of such deficiency. To secure the prompt payment of any such deficiencies, the Broadcaster will maintain the sum of \$—— [fol. 329] on deposit with Mutual. Such deposit, if not theretofore exhausted, shall be applied to the payment of any deficiency for the last month of this contract. Any portion of such deposit not so applied shall be refunded to the Broadcaster by Mutual upon the termination of this contract.

5. Mutual agrees to use its best efforts to obtain from its various affiliated stations and to otherwise develop sustaining programs of high quality, including: broadcasts of national and international events, speeches by national and international figures in the fields of government, education, religion, agriculture, and the arts, broadcasts of operas, symphony concerts, and other musical events, dramatic presentations and other educational or entertainment programs of general interest, for broadcasting by the stations composing its network. So long as the Broadcaster shall faithfully perform all of its agreements herein contained, Mutual will transmit to the Broadcaster for broadcasting by the Station such Mutual sustaining programs as may from time to time be transmitted over Mutual's Chicago — line, unless Mutual is prevented from so doing by causes beyond its control, or unless such transmission might involve Mutual or the originating station in a labor dispute. The Broadcaster shall not, without the prior consent of Mutual, broadcast any of these programs as sponsored programs or in any other manner use any of these programs or permit them to be used for commercial purposes, shall not furnish any of these programs to any other station, shall not make any transcription or recording of any of these programs, except for delayed broadcasting on the Station, and shall not consent to the rebroadcasting of any of these

programs by any other station. The Broadcaster agrees to make available to Mutual, for transmission to the other stations affiliated with the Mutual network, the outstanding sustaining programs produced or developed by the Broadcaster.

6. The Broadcaster agrees that during the term of this contract it will not enter into any contract with any person, firm or corporation wherein the Broadcaster agrees to broadcast programs through the Station exclusively for any other network or wherein the Broadcaster gives such network any exclusive option on, or exclusive priority rights over, any broadcasting time on the Station. The Broad- [fol. 330] caster further agrees that it will not discriminate against Mutual and in favor of any other network organization in the sale of its broadcasting time, in that, if it sells broadcasting time to any other network organization, it will, in acting upon requests for the same period of time from Mutual and such other network organization, adhere to the principle of first-come-first-served. The Broadcaster further agrees that it will not make any commitment with respect to any period or periods of time on the Station to any other network organization in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission. If the Broadcaster shall enter into any contract or agreement with any other network organization or shall enter into any contract or agreement with any person, firm or corporation for the broadcasting of any program to be transmitted to the Station by any other network organization, the Broadcaster agrees to furnish Mutual with a true and complete copy of such contract or agreement within five (5) days after it is executed or made. The Broadcaster further agrees to give Mutual written notice of any sale of broadcasting time on the Station within the Mutual option time made to any other network organization, pursuant to any such contract or agreement. Such notice shall be given to Mutual by the Broadcaster within five (5) days after the commitment to furnish the broadcasting time is made by the Broadcaster and shall specify the period or periods of time to be furnished, the date or dates upon which such period or periods are to be furnished, the network organization to which such period or periods are to be furnished, the advertiser whose program or programs are to be broadcast during said period or periods and

the compensation to be received by the Broadcaster for said period or periods.

7. This agreement shall, unless sooner terminated as hereinafter provided, remain in effect for a period of — years, ending — —, 194—, and shall then be renewed on the same terms and conditions for a further period of — years, and so on for successive further periods of — years each, unless and until either party shall, at least — days prior to the expiration of the then current term, give the other party written notice that it does not desire to have the contract renewed for a further period.

8. If any of the licensees of radio stations contributing to the cost of Mutual's program transmission line extend- [fol. 331] ing to — — shall cease to make such contributions, Mutual may give written notice to the Broadcaster of Mutual's desire to terminate this contract, such notice to be given by registered mail at least thirty (30) days prior to the date upon which Mutual proposes that the termination shall become effective. This contract will terminate on the effective date specified in Mutual's notice, unless the Broadcaster shall, within ten (10) days after the date of Mutual's notice, deliver to Mutual a binding agreement by the Broadcaster to pay to Mutual, during the remainder of the term of this contract, an additional amount each month equal to the contributions theretofore made by the licensee or licensees ceasing to make such contributions.

9. If the ownership or control of the Station or of the controlling interests in the capital stock of the Broadcaster shall be voluntarily or involuntarily transferred from its present holder or holders, Mutual may terminate this contract by giving written notice to the Broadcaster by registered mail at least thirty (30) days prior to the date upon which such termination is to become effective.

10. The Broadcaster agrees that it will not use the name "Mutual Broadcasting System" or any similar name, except pursuant to the terms and conditions of this contract and in a manner consistent with its provisions.

11. It is understood and agreed that neither of the parties is the agent or representative of the other for any purpose whatsoever and that no partnership relationship exists between the parties.

12. This agreement is subject to all present and future rules, regulations, and orders of the Federal Communications Commission and to all laws of the United States of America now or hereafter in force.

In Witness Whereof, the parties hereunto have executed this contract, or have caused it to be executed by their duly authorized officers, as of the day and year first above written, on the respective dates indicated after their signatures.

MUTUAL BROADCASTING SYSTEM, INC.

By

Date

By

Date

APPENDIX F

Summary of Available Full-Time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage ¹	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Ten or More Full-time Commercial Stations					
New York, N. Y. ²	11,680,520	1	6	14	3
Los Angeles, Cal.	2,904,596	3	8	13	4 ³
Nine Full-time Commercial Stations					
Chicago, Ill. ⁴	4,499,126	2	5	9	5
San Francisco-Oakland, Cal.	1,428,525	9	8	9	3
Eight Full-time Commercial Stations					
Boston, Mass. ⁵	2,350,514	5	6	8	3
Philadelphia, Pa. ⁶	2,808,644	4	5	7	3
Six Full-time Commercial Stations					
Detroit, Mich. ⁷	2,295,867	6	3 ⁴	6 ⁴	3
Washington, D. C. ⁸	907,816	13	4	6	3
Kansas City, Kans.-Kansas City, Mo. ⁹	624,093	18	5 ²	6 ²	3 ²
Seattle, Wash.	452,639	24	5	6	3
Five Full-time Commercial Stations					
Pittsburgh, Pa. ¹⁰	1,994,080	7	4 ⁵	5	3
St. Louis, Mo. ¹¹	1,367,977	8	4	5	3
Baltimore, Md. ¹²	1,046,692	11	3 ⁶	5	3
Minneapolis-St. Paul, Minn. ¹³	911,077	12	4	5	3
Buffalo-Niagara Falls, N. Y. ¹⁴	857,719	14	3	5	4 ⁵
Cincinnati, O. ¹⁵	789,309	16	4	5	3
New Orleans, La.	540,030	20	3	5	3

Four Full-time Commercial Stations					
Portland, Ore.	406,406	30	4	5	3
Denver, Colo.	384,372	32	4	5	3
San Antonio, Tex.	319,010	42	2	5	2
Providence, R. I.					
Beranton-Wilkes-Barre, Pa.	711,500	17	0 ^a	4	3
Hartford-New Britain, Conn.	629,581	19	0	4 ^a	1 ^a
Indianapolis, Ind.	502,193	22	2	4	3
Atlanta, Ga.	455,357	23	4	4	3
Loserville, Ky.	442,294	25	3	4	3
Albany-Schenectady-Troy, N. Y.	434,408	26	2	4	3
Springfield-Holyoke, Mass.	431,575	27	1	4	3
Dallas, Tex.	394,623	31	2	4	2
Memphis, Tenn.	376,548	33	4 ^a	4	3 ^a
Syracuse, N. Y.	332,477	39	3	4	2
Oklahoma City, Okla.	256,352	48	4	4	2
Tampa-St. Petersburg, Fla.	231,220	53	4	4	3
Fort Worth, Tex.	209,063	56	4	4	3
Tacoma, Wash.	207,677	57	4 ^a	4 ^a	3 ^a
Spokane, Wash.	166,018	76	2	4	0
	141,370	84	3	4	3

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage ¹	Total number of full-time commercial stations ²	Number of stations owned by or affiliated with Columbia and National
Three Full-time Commercial Stations					
Cleveland, O. ³	1,214,943	10	3	3	3
Milwaukee, Wis.	790,336	15	3	3	3
Houston, Tex.	510,397	21	3	3	3
Rochester, N. Y. ⁴	411,970	28	2	3	2
Birmingham, Ala.	407,851	29	2	3	2
Youngstown, O.	373,438	34	2	3	2
Albany, O. ⁵	349,705	36	2	3	2
Worcester, Mass. ⁶	306,194	44	2	3	2
Omaha-Council Bluffs, Nebr.-Ia. ⁷	257,698	45	2	3	2
San Diego, Cal.	256,368	49	3	3	3
Miami, Fla.	250,537	50	3	3	3
Richmond, Va. ⁸	245,674	51	3	3	3
Nashville, Tenn.	241,769	52	3	3	3
Salt Lake City, Utah	204,488	58	3	3	3
Jacksonville, Fla.	195,619	63	1	3	2
Chattanooga, Tenn.	193,215	64	2	3	2
Tulsa, Okla.	188,562	66	2	3	2
Des Moines, Ia. ⁹	183,973	68	3	3	3
Duluth-Superior, Minn.-Wis.	157,068	75	3	3	3
Knoxville, Tenn.	151,829	78	3	3	3
Beaumont-Port Arthur, Tex.	138,608	85	3	3	3
Wichita, Kans.	127,308	92	3	3	3

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APPENDIX F—Continued

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941—Continued

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage ¹	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Two Full-time Commercial Stations (Continued)					
Waterbury, Conn.	144,822	82	1	2	1
Evansville, Ind.	141,614	83	2	2	2
Charleston, W. Va.	136,322	86	1	2	2
Fort Wayne, Ind. ^a	134,365	88	1	2	2
Erie, Pa.	134,089	89	2	2	2
Savannah, Ga.	117,970	96	2	2	2
El Paso, Tex.	115,801	96	2	2	2
Mobile, Ala.	114,906	97	2	2	2
Charlotte, N. C.	112,966	99	2 ^{as}	2	1
Rossville, Va.	110,598	102	2	2	1
Winston-Salem, N. C.	109,833	104	2	2	1
Portland, Me. ^a	108,568	106	2	2	2
Atlantic City, N. J.	100,096	108	2	2	1
Charleston, S. C.	98,711	109	2	2	2
Fresno, Cal.	97,504	110	2	2	2
Montgomery, Ala.	93,697	111	2	2	2
Columbia, S. C.	89,555	114	2	2	2
Springfield, Ill.	89,494	115	2	2	2
Lincoln, Nebr. ^a	88,191	116	2	2	1
Jackson, Miss.	88,003	117	2	2	1
Augusta, Ga.	87,809	118	2	2	2

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by
or Affiliated with Columbia and National as of November 1, 1941—Continued

Metropolitan District	Population	Rank according to population	Number of full- time commercial stations having adequate coverage ¹	Total number of full-time commercial stations	Number of stations owned by or affiliated with Co- lumbia and Na- tional
One Full-time Commercial Station (Continued)					
Utica-Rome, N. Y.	197,128	61	1	1	1
Flint, Mich.	188,554	67	1	1	1
Reading, Pa.	178,355	69	1	1	1
Peoria, Ill.	162,566	73	1	1	1
Baytown-Bay City, Mich.	153,388	77	1	1	1
Johnstown, Pa.	151,781	79	1	1	1
South Bend, Ind.	147,022	80	1	1	1
Binghamton, N. Y.	145,156	81	1	1	1
Racine-Kenosha, Wis.	135,075	87	1	1	1
Lancaster, Pa.	132,037	90	1	1	0
San Jose, Cal.	129,367	91	1	1	0
Albama, Pa.	114,094	98	1	1	1
Lansing, Mich.	110,356	103	1	1	1
Austin, Tex.	106,193	106	1	1	0
Rockford, Ill.	105,259	107	1	1	0
York, Pa.	92,637	112	1	1	1
Columbus, Ga.	92,478	113	1	1	0
St. Joseph, Mo.	86,991	120	1	1	0
Berkeley, Cal.	85,547	"	1	1	0
Terre Haute, Ind.	83,370	121	1	1	0
Stockton, Cal.	79,337	123	1	1	0
Madison, Wis.	78,340	124	1	1	1

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Topeka, Kans.	77,749	125	1
Springfield, O.	77,406	126	1
Kalamazoo, Mich.	77,213	127	1
Cedar Rapids, Ia.	73,219	130	1
Greenboro, N. C.	73,055	131	1
Galveston, Tex.	71,677	132	1
Waco, Tex.	71,114	133	1
Durham, N. C.	69,683	136	1
Decatur, Ill.	65,764	138	1
Pueblo, Colo.	62,039	139	1
No Full-time Commercial Stations			
Hamilton-Middletown, O.	112,686	100	0
Watertown, Ia.	67,050	137	0

Summary of Cities Having Population of 50,000 or More in Which National and Columbia Restrictive Contracts with Affiliates Permit No Access or Only a Limited Access, by Mutual (November 1, 1941)

Cities in order of size having a population of 50,000 or more in which Mutual has no outlet, in which Columbia or National, or both have restrictive contracts with full-time outlets, and in which no independent full-time outlet is available.

Youngstown, O.	Johnstown, Pa.	Columbus, Ga.
Toledo, O.	South Bend, Ind.	Jackson, Miss.
Dayton, O.	Charleston, W. Va.	Augusta, Ga.
Miami, Fla.	Fort Wayne, Ind.	Terre Haute, Ind.
Utica-Rome, N. Y.	Erie, Pa.	Madison, Wis.
Wheeling, W. Va.	Savannah, Ga.	Springfield, O.
Flint, Mich.	El Paso, Tex.	Kalamazoo, Mich.
Reading, Pa.	Altoona, Pa.	Greensboro, N. C.
Peoria, Ill.	Lansing, Mich.	Durham, N. C.
Sacramento, Calif.	Portland, Me.	Pueblo, Colo.
Saginaw-Bay City, Mich.	Charleston, S. C.	Topeka, Kan.
	Montgomery, Ala.	Asheville, N. C.

II

Cities in order of size having a population of 50,000 or more in which Mutual has a local or part-time station as an outlet, in which Columbia or National, or both, have restrictive contracts with full-time regional or clear channel outlets, and in which no full-time regional or clear-channel facilities are available.

New Orleans, La.	San Antonio, Tex.
Scranton-Wilkes-Barre, Pa.	Oklahoma City, Okla.
Hartford-New Britain, Conn.	Chattanooga, Tenn.
Atlanta, Ga.	Wilmington, Del.
Louisville, Ky.	Duluth-Superior, Minn.-Wis.
Albany-Schenectady-Troy, N. Y.	Knorrville, Tenn.
Rochester, N. Y.	Little Rock, Ark.
Columbus, O.	Mobile, Ala.
Akron, O.	Rossmore, Va.
Lowell-Lawrence, Mass.	Winston-Salem, N. C.
Allentown, Pa.	Sioux City, Iowa
Norfolk, Va.	Lincoln, Neb.
	Macon, Ga.
	Amarillo, Tex.

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III

Cities in order of size having a population of 50,000 or more in which Mutual has as an outlet¹ station also used by another major network, in which Columbia or National, or both, have restrictive contracts with or own full-time regional or clear-channel outlets, and in which:

(a) There is no full-time independent station available.

Cleveland, O.
Houston, Tex.
Birmingham, Ala.
Richmond, Va.
Salt Lake City, Utah
Jacksonville, Fla.
Tulsa, Okla.
Des Moines, Ia.
Harrisburg, Pa.

Binghamton, N. Y.
Evansville, Ind.
Lancaster, Pa.
Charlotte, N. C.
York, Pa.
Columbia, S. C.
Manchester, N. H.
Cedar Rapids, Ia.

(b) The only independent full-time outlet available is a local station;

Spokane, Wash.
Corpus Christi, Tex.

Footnotes

¹ Although the determination of the number of full-time stations having adequate coverage throughout the various metropolitan areas presents several problems (due principally to doubts as to whether the low power local stations have adequate coverage), liberality has been exercised, and where doubt exists, the doubt has been resolved, in most instances, in favor of adequate coverage. In the preparation of this appendix, outstanding construction permits have been considered as authorizing operation in accordance therewith.

² Basic on both NBC Red and Blue, and CBS.

³ Columbia owns KNX. KMPC is available as an alternate or additional station with KNX.

⁴ These figures do not include CKLW, Windsor, Canada. Mutual's Detroit outlet. This station, which prior to 1935 was a Columbia affiliate, is used by Mutual because of the insufficient number of full-time stations having adequate coverage of the Detroit Metropolitan District.

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Footnotes—Continued

- * These figures include WREN, the NBC basic Blue network outlet. With the exception of one-half hour on weekdays from 2:30 to 3:00 p.m., WREN operates unlimited time.
- * The coverage of all Pittsburgh stations, with the exception of KDKA, is doubtful because of the size of the Pittsburgh Metropolitan District.
- * Basic on both NBC Red and Blue.
- * Two stations are affiliated with Columbia, WGR and WKBW.
- * Although the stations in this district adequately cover the cities in which they are located, it is doubtful whether their coverage is adequate for the entire metropolitan district. The only full-time station not affiliated under restrictive contracts with National or Columbia is WPCI in Pawtucket, R. I., a city adjacent to Providence.
- * The Columbia station is WGBI, a station sharing time with WQAN.
- * Basic on NBC Red and CBS.
- * Basic on CBS.
- * Basic on NBC Blue.
- * These figures include KRLD and KOKO.
- * Basic on NBC Blue and CBS.
- * Basic on NBC Red.
- * These figures include KWKH, 50 kw.
- * This includes WBT, 50 kw.
- * KRIS, a regional station, is affiliated with the Red and Blue networks of National. The same station is also used by Mutual. KEYS, a local station, has only recently been authorized to operate.
- * This station is WPTF, 50 kw.
- * This includes KOB, 50 kw.
- * These cities are not large enough to be classified as metropolitan districts, and are included because of the presence of more than one full-time commercial station.
- * Berkeley is not listed as a metropolitan area; it would rank 121st in population.
- * Columbia affiliate, operates part-time.
- * WGBI, the Columbia affiliate, shares time with WQAN but uses most of the available time.

344

[fol. 343]

APPENDIX G

First Cancellation of the Ballantine Program

J. Walter Thompson Company
420 Lexington Avenue,
New York,
October 23, 1941.

Mr. Sidney P. Allen, Mutual Broadcasting System, 1440
Broadway, New York City.

DEAR MR. ALLEN:

We regret that it is necessary to send you the attached cancellation of the Ballantine program. However, as discussed over the telephone we plan to move the program from the Mutual Network after the broadcast of Friday, October 31.

Whenever you are able to discuss shortrate and payment details, please let me know.

Sincerely yours, J. Walter Thompson Company, (S.)
Linnea Nelson.

L. Nelson: AW.

J. Walter Thompson Company
420 Lexington Avenue,
New York.
October 23, 1941.

Radio Suspension Order

Mutual Broadcasting System, 1440 Broadway, New York
City.

GENTLEMEN: RE: P. BALLANTINE & SONS:

Kindly cancel broadcasting ordered for the above client
as follows:

One-half hour—9:30 to 10:00 P. M. New York Time.
44 times—once a week—every Friday.
November 7, 1941 to and including September 4, 1942.

Over Mutual coast-to-coast Network—77 stations.
There is to be no broadcasting after October 31, 1941.

[fol. 344] This was ordered on June 24, July 29, August 21 and September 12, 1941.

Kindly sign and return the enclosed copy.

J. Walter Thompson Company, Per (S.) Linnea Nelson.

APPENDIX H

Final Cancellation of the Ballantine Program

J. Walter Thompson Company
420 Lexington Avenue,
New York,
October 27, 1941.

Mr. Sidney P. Allen, Mutual Broadcasting System, 1440 Broadway, New York City.

DEAR MR. ALLEN:

Attached is radio suspension order dated October 27th, which cancels and supersedes the one previously given you dated October 23rd.

Won't you please return the October 23rd copy unsigned and the October 27th copy with signature.

Sincerely yours, J. Walter Thompson Company, (S.)
Linnea Nelson.

L. Nelson: AW, cc: Mr. Wood.

J. Walter Thompson Company
420 Lexington Avenue,
New York.

Radio Suspension Order

October 27, 1941.

Mutual Broadcasting System, 1440 Broadway, New York City.

GENTLEMEN: RE: P. BALLANTINE & SONS:

Kindly cancel broadcasting ordered for the above client as follows:

One-half hours—9:30 to 10:00 P. M. New York Time.

[fol. 345] 39 times—once a week—every Friday.
 December 12, 1941 to and including September 4, 1942.
 Over Mutual coast-to-coast Network—77 stations.
 There is to be no broadcasting after December 5, 1941.

This was ordered on June 24, July 29, August 21 and
 September 12, 1941.

Kindly sign and return the enclosed copy.

J. Walter Thompson Company, Per (S.) Linnea
 Nelson.

APPENDIX I

Excerpts from Trade Journals on Loss of Ballantine Program

Broadcasting.

October 27, 1941.

Page 50.

Ballantine Quits Mutual for Blue

P. Ballantine & Sons, Newark brewer, is shifting its *Three Ring Time* series from MBS to NBC-Blue, beginning on the latter network Nov. 7. Series, Starring Charles Laughton, Milton Berle and Bob Crosby's orchestra, will be broadcast for 52 weeks on more than 20 Blue stations, Fridays, 8:30-9 p. m., a half-hour earlier than its present Friday evening spot on MBS.

Agency in charge of the account, J. Walter Thompson Co., New York, had nothing to say about plans for a substitute program on MBS for the duration of the contract with that network, which runs until mid-December.

In accepting the Ballantine program, NBC-Blue is deviating from the NBC code of policies and standards, which states that "alcoholic beverages may not be advertised on any network program," although individual NBC M & O stations have accepted beer advertising for local broadcasts. When this prohibition was adopted early in 1939, NBC explained that network programs must be acceptable to all parts of the country and at all times, whereas beer advertising was acceptable in some communities but not in others and was much more acceptable at some times than at others.

[fol. 346] Variety.

October 29, 1941.

Page 31.

Mutual-NBC Beer Brawl

Bitter Charges on NBC's Ways

One of Radio's Name-Calling Competitive Situations Develops as Blue Wins Account—Ballantine Will Finish 13-Week Cycle, However

"Fly." in the Suds

Radio was faced last week with one of its bitterest competitive squabbles when the J. Walter Thompson agency disclosed that the Ballantine program was switching suddenly from the Mutual Network to the NBC Blue. The furor subsided Monday (26) as NBC took the position that it would prefer to have Ballantine complete its present 13-week cycle on Mutual and that it did not want to be a party to an account's abrupt walkout from a competitive network under the circumstances that prevail.

The sudden dissipation of the proposed immediate transfer was preceded by a vigorous bombardment of charges from Mutual, with the Blue network the principal target. That the event possessed nasty litigation and publicity possibilities was immediately apparent to all when Mutual accused NBC of going to the extreme of reversing its own policy against beer advertising to wean away the account, of giving guarantees to the agency and the account against any action for damages, and of taking the program from stations presently receiving it through Mutual only to feed it back a half-hour earlier the same night at 40% less compensation to the station. The guarantee angles were stoutly denied by both NBC and the Thompson agency.

MBS' Fear

Charges of "dirty pool" were especially stressed by Mutual because of its fear that the blow will be used by rival radio salesmen and echoed by the thoughtless, including radio and other columnists, as a disparagement of Mutual. The Ballantine program with Charles Laughton, Milton Berle, Shirley Ross and Bob Crosby, was not only an important account financially but brought Mutual a name-

[fol. 347] studded cast, something extremely vital to its expansion and prestige.

The Ballantine blow was followed by rumors that NBC would go even further in competitive appeals to Coca Cola, the second big name-studded series which Mutual lined up for this season. This program has not yet begun broadcasting. Both NBC and CBS tried desperately to land the Coca-Cola contract but failed, because in some measure ASCAP music was unavailable on NBC and CBS and was available on Mutual. Personal acrimonies growing out of earlier phases of the ASCAP situation also played a part.

Sudden switch of the Ballantine Beer program may also become embroiled as an issue in the current controversy over the Federal Communications Commission's new regulations on network broadcasting. The Mutual management and legal staff have held several huddles on the matter but no decision has been made as to what trend the web's loss of the Ballantine business will take.

J. Walter Thompson, agency on the Ballantine account, had announced that the show will move into the Blue's Friday 8:30 to 9 p. m. spot Nov. 7. It would have made the first time a program had been transferred from one network to another (competitive) within the initial 13-week cycle. Acceptance of the Ballantine account involves a drastic reversal in policy on the part of NBC. Latter network had been offered the business before the program went on Mutual five weeks ago but NBC at the time refused to budge from the policy tabooing beer which has been in effect since 1936. Other recent revisions of NBC policies, but all of which have been confined to the Blue link concern the acceptance of laxative accounts and the use of recordings over a hookup.

Says Thompson

In defending its position the Thompson agency pointed out last week that the move was in line with an understanding it had with NBC at the time the agency failed to obtain facilities on the Blue for Ballantine. According to the agency, NBC was informed that if it ever changed its policy on beer to let Thompson know immediately.

Thompson got the word from NBC last Tuesday (21) and, according to the Mutual version, was given 48 hours in which to turn in an order for the Friday evening period. [fol. 348] The agency asked Mutual for a release from its

contract, which covered 52 weeks but bound the account only for 13 weeks, but Mutual not only turned down the request but advised Thompson that the account would be held liable for the billings entailed in the remaining five weeks of the 13-week cycle. This obligation amounts to \$45,800. Ballantine's appropriation for time over the 52 weeks is \$200,000.

When Thompson, according to Mutual, asked for the release it gave as its reason for switching networks the fact that the Ballantine program had been dropped by the Blue's affiliates in Providence, Cleveland, Bridgeport and Jacksonville. Mutual took the matter up with Ballantine Friday (24) and the account stated that it would go along with the agency on the proposition. The last ratings on the Ballantine show have been 2.9 on the Co-operative Analysis of Broadcasting and 4.8 on the C. E. Hooper reports.

Variety.

October 29, 1941.

Page 38.

The Radio Trade is Discussing: Mutual's loss of its one big Coast show to NBC, the Ballantine aler, and the expectation that other beer accounts may go NBC.

APPENDIX J

Excerpt from Trade Journal on March of Time Program

Broadcasting.

October 13, 1941.

Page 66.

NBC Relaxes Rule for Time Series

To cooperate with Time Inc. and Young & Rubicam in making the March of Time, which returned to the air last week as a half-hour Thursday evening Blue Network program, as effective as possible, NBC has relaxed its rules against dramatizations of war scenes and impersonations of world figures.

Series will also on occasion utilize recordings of speeches and of songs and music necessary for authentic radio presentation of current events, although recordings are usually forbidden from the networks except as sound effects.

[fol. 349] Everything possible to make these new *March of Time* broadcasts realistic and impressive will be done, according to NBC, where it was explained that when the sponsor is a publishing company with full realization of its responsibility to the public it is entitled to special consideration in instances where application of the customary network rules would adversely affect the program. Each such case will be considered as it arises on its own merits, it was stated, with decisions being made as necessary from week to week.

APPENDIX K

Excerpts from Trade Journals on Coca-Cola Program

Variety.

October 8, 1941.

Page 24.

Blue Expects Every Affiliate to Do Its Duty to Sterling Products

NBC station relations department disclosed last week that it proposes to have a showdown with those Blue network affiliates that pass up the two Sterling Products half-hours for the Coca Cola series which will clear through Mutual. These stations have already been given their 28-day removal notices together with a warning that NBC expects them to live up to the terms of their contract.

The Blue stations involved have guaranteed to deliver 10 p. m. across the board to Mutual for the beverage account, which starts Nov. 3. After Mutual obtained the guarantees the Blue sold the 10 to 10:30 segments, Monday and Wednesday, to Sterling with Oct. 20 the starting date.

Broadcasting.

October 13, 1941.

Page 14.

Coca Cola Series Conflicts on Blue

NBC to Hold Stations for Sterling Products Pair

Stations which are affiliated both with NBC-Blue and MBS and which have been sold as outlets for both the Coca-
[fol. 350] Cola broadcasts on Mutual and the Sterling Prod-

ucts broadcasts on the Blue have received notice from NBC they will be expected to carry the Sterling Products programs.

In sending the 28-day removal notices to the six stations involved, NBC pointed out that the two Blue programs, *Monday Merry-Go-Round* for Dr. Lyons' toothpowder and *Melody Hour* for Bayer's aspirin, occur at 10-10:30 p. m. on Monday and Wednesday evenings respectively, which is network time, and that the stations are obliged to carry them under the terms of their affiliation contracts with NBC.

Other Disputes Solved

These programs start on Oct. 20 and 22. The Mutual Coca Cola series, to begin Nov. 3, calls for 10:15-10:30 p. m. broadcasts Monday through Friday, and 10-10:30 p. m. on Saturday. Blackett-Sample-Hummert, New York, is the agency for the programs on the Blue; D'Arcy Adv. Co., St. Louis, handles the Coca Cola advertising.

Signing of the Wednesday evening 10-10:30 program relieves NBC of the necessity of settling a dispute between R. J. Reynolds Tobacco Co. and American Tobacco Co.

Sale of the Wednesday evening spot to Sterling got NBC out of the middle of a dispute between two tobacco companies over seven Blue outlets in the West. When R. J. Reynolds Tobacco Co. moved its *Penthouse Party* to the Blue on Wednesdays, 9:30-10 p. m., it requested that these stations be removed from the schedule of the Kay Kyser show, broadcast 10-11 p. m. Wednesdays, sponsored by American Tobacco Co. for *Lucky Strikes*, under the NBC rule prohibiting continuous broadcast of competitive products. Latter program is a Red Network show, but used the Blue stations in the Western cities as supplementary outlets. When Sterling bought the Blue network 10-10:30 and preempted these stations, the contiguity was removed, automatically ending the dispute.

[fol. 350a] IN DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HOPE H. BARROLL, JR., EXECUTIVE VICE PRESIDENT OF BALTIMORE RADIO SHOW, INC., LICENSEE OF STATION WFBR, BALTIMORE, MARYLAND, IN OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTION

CITY OF WASHINGTON,
District of Columbia, ss:

Hope H. Barroll, Jr., being duly sworn, upon oath deposes and says:

1. *Deponent.* I am General Manager of Station WFBR, Baltimore, Maryland, and am Executive Vice President of the Baltimore Radio Show, Inc., the company owning and [fol. 350b] operating Station WFBR. I have been connected with Station WFBR in an executive capacity since 1933 and have intimate knowledge of the operation of a station affiliated with national network companies. I am familiar with the bills of complaint and motions for a preliminary injunction filed by plaintiffs in Civil Actions 16-178 and 16-179, together with the affidavits of plaintiffs' officers in support thereof. This affidavit is filed in opposition to plaintiffs' motions for a preliminary injunction.

As the active head of a network station operating in a large metropolitan area I have knowledge of the problems connected with the network broadcasting industry, and particularly with the operations and business practices of the National Broadcasting Company, Inc. and the Mutual Broadcasting System, Inc. I am also familiar with the regulations promulgated by the Federal Communications Commission in "In the Matter of the Investigation of Chain Broadcasting" (Docket 5060) and testified before the Senate Interstate Commerce Committee on June 20, 1941 in opposition to the adoption of the so-called White Resolution (S. Res. 113, 77th Cong., 1st Sess.) directing a study of the rules and regulations of the Federal Communications Commission pertaining to network broadcasting.

2. *Network Affiliation of Station WFBR.* From 1931 to October 1, 1941 Station WFBR was affiliated with the National Broadcasting Company, Inc. and was a basic station

on the Red network operated by that company. On the latter date the station's affiliation with National Broadcasting Company, Inc. was terminated and it became an affiliate, with an option to purchase stock, of the Mutual Broadcasting System, Inc. under circumstances explained below.

3. *Permanent Assets of Station WFBR.* The permanent assets of Station WFBR have a present or depreciated value of \$177,488.83. The original cost of these assets was \$256,214.83.

[fol. 350c] 4. *The option Time Clauses in Contracts between National Broadcasting Company, Inc. and Affiliates.* One of the effects of the network option time clauses in contracts between National Broadcasting Company, Inc. and its affiliates is to prevent stations from broadcasting programs of outstanding local interest during the desirable hours producing maximum listener response. Prior to October 1, 1941, the National Broadcasting Company, Inc. pursuant to contract, had an option, exercisable upon 28 days' notice, upon most of the desirable broadcasting periods of Station WFBR. This option covered the following periods:

Week Days	Sundays
10 a.m. to 12 noon	1 p.m. to 4 p.m.
3 p.m. to 6 p.m.	5 p.m. to 6 p.m.
7 p.m. to 7:30 p.m.	7 p.m. to 11 p.m.
8 p.m. to 11 p.m.	

Upon 28 days' notice to the effect that National Broadcasting Company, Inc. was scheduling a network commercial program during the option periods, the licensee of Station WFBR was required to clear time for the network commercial program and discontinue local or national spot commercial programs and even local sustaining programs of outstanding importance.

An illustration of the inability of an affiliate of National Broadcasting Company, Inc. to exercise full control over its program service and of the adverse effect upon the public interest resulting from the exercise of options on stations' time by the National Broadcasting Company, Inc., is shown by the request of National Broadcasting Company, Inc. that Station WFBR broadcast the Proctor & Gamble

program. In January, 1940 Baltimore Radio Show, Inc. received a request from the National Broadcasting Company, Inc. to broadcast a commercial program for Proctor & Gamble from 9:30 to 10:00 p.m. each Friday. For two or three years prior thereto, Station WFBR had been broadcasting a recruiting program for the Maryland National [fol. 350d] Guard at the special request of Major General Milton A. Reckord, Commanding General of the 29th Division stationed at Ft. Meade. This program was broadcast every Friday from 9:45 to 10:00 p.m. Baltimore Radio Show, Inc. advised the National Broadcasting Company, Inc. that as it considered the National Guard program to be more in the public interest than the Proctor & Gamble program and as the schedules for the programs conflicted, the station would be unable to broadcast the Proctor & Gamble commercial program. I received a letter in reply from Mr. William S. Hedges, vice president of the National Broadcasting Company, Inc., stating that our scheduling of the National Guard program was "grossly unfair" in that the licensee had scheduled it in network option time, complaining of the lack of cooperation rendered by the licensee to the network, and threatening to shift Station WFBR from the profitable Red Network with which it had been affiliated since 1931 to the Blue network. This letter from Mr. Hedges reads as follows:

"January 25, 1940.

Mr. Hope H. Barroll, Jr., General Manager, Radio Station WFBR, Baltimore, Maryland

DEAR HOPE:

Commercial Traffic has given me a copy of your wire in which you refuse to accept P&G Friday 9:30-10:00. If the Maryland National Guard program is of such transcendent importance, why don't you use your own time for it? That was the reason why time of affiliates was divided between network optional time and station time. We have always been willing to step aside for important local broadcasts which come up from time to time, but I think it is grossly unfair for you to set up a permanent schedule in network optional time for something which you should handle in your own station time.

[fol. 350e] I must say that I have not been at all happy with the degree of cooperation which you have extended to

NBC during the recent months. It can lead to only one conclusion, and that is that you are not happy as a member of the Red network. Maybe we can do something about that, too.

Sincerely yours, (s) Bill. William S. Hedges."

On February 15, 1940, I replied to Mr. Hedges' letter and attach hereto as Exhibit "A" a copy of my reply.

The position taken by the National Broadcasting Company, Inc. resulted in the licensee of Station WFBR moving the National Guard program to a less desirable period. This shift meant a loss of a great part of the audience which had become accustomed to listening to this program from 9:45 to 10:00 p. m. The Procter & Gamble program is the same program which previously had been scheduled for the period from 7:00 to 7:30 p. m. on Saturdays. The Baltimore Radio Show, Inc. had not been able to clear this time due to the fact that another sustaining program concerning the City Health Department had used that spot for several years. The offer of the licensee of Station WFBR to record the Procter & Gamble program and broadcast it at another time proved unsatisfactory to the sponsor and the order was cancelled. The program was then placed on Station WBAL in Baltimore and was broadcast by that station until the decision of the sponsor to shift the program from Saturday to Friday.

If Regulation 3.105 had been in effect when the Procter & Gamble program was offered to Station WFBR, the licensee would have been able to reject the Procter & Gamble program and to continue to broadcast the National Guard program during its regular period. This regulation, in effect, provides that no contract between a network and its affiliates shall contain a provision preventing the affiliate from substituting a program of outstanding local importance for a network commercial program. Moreover, Regulation 3.104 limits the amount of option time that a national network company may have on an affiliate station, so that, in any event, a reasonable amount of time in each part of the day will remain free from network options and from any obligation thereunder.

5. Loss of Red Network Affiliation by Station WFBR.
By reason of the operation of two networks by National Broadcasting Company, Inc., that company is in a position to exert pressure, and does exert pressure, upon affiliates to

comply with its demands under threat of being shifted from one of its networks to the other. In 1940 I learned that National Broadcasting Company, Inc. contemplated shifting Station WBAL, the regular Blue network outlet in Baltimore, to the Red network and Station WFBR to the Blue network. Shortly thereafter I had a conference with Mr. Trammell, president of National Broadcasting Company, Inc., in New York, at which conference were also present Mr. Phillip G. Loucks, one of my attorneys, and Mr. Harold Batchelder, my associate. Mr. Trammell notified us at this conference that National Broadcasting Company, Inc. had concluded arrangements to shift Station WBAL in Baltimore to the Red network as of October 1, 1941, thus requiring Station WFBR to move to the Blue network. Mr. Trammell offered to permit Station WFBR to become a basic Blue network outlet with a network rate of \$300.00 per hour, which was the network rate that the licensee of Station WFBR had requested National Broadcasting Company, Inc. to charge for the station for some time. The local rate of Station WFBR had been \$300.00 per hour for several years while the network rate had been \$260.00. Further, National Broadcasting Company, Inc., through its president, Mr. Trammell, offered to guarantee that the compensation from National Broadcasting Company, Inc. to the Baltimore Radio Show, Inc. would be \$125,000 for the first year, \$100,000 for the second year and the third year [fol. 350g] guarantee would be negotiated. This offer of guaranty in connection with the Blue network, whereas there had never been any guaranty or offer of one in connection with the Red network, was confirmed in writing by Mr. Trammell. Upon information and belief, this guaranty was made for the purpose of preventing the affiliation of Station WFBR with the Mutual Broadcasting System, Inc.

6. *Irreparable Injury to Station WFBR.* The granting of plaintiffs' motions for a preliminary injunction would cause irreparable injury to the licensee of Station WFBR. Due to the limitation in the number of full time broadcast stations rendering adequate coverage, Mutual Broadcasting System, Inc. finds it necessary in 27 cities, many of which are important markets, to transmit its network programs to a station also used by one of the other national network companies. These stations have granted options on all or most of their desirable hours to National Broadcasting Company, Inc. or to Columbia Broadcasting Sys-

tem, Inc. The exercise of such options by competitive networks during periods when commercial programs of Mutual Broadcasting System, Inc., are being broadcast results either in the enforced transcribing of the Mutual programs and their broadcast at a later time or on another day or, if the advertisers are not satisfied with the presentation of their programs through recordings, the advertisers discontinue the use of the Mutual network. Similarly, many advertisers are unwilling to consider the use of the Mutual network either because of its inability to reach many important markets or its inability to assure the continued availability of the time of its affiliated stations to advertisers during the periods of time covered by their respective contracts.

The Ballantine Ale program, referred to in Mr. Weber's affidavit, is an outstanding commercial program and has been broadcast by Station WFBR since its affiliation with [fol. 350h] the Mutual network. However, due to the exercise by National Broadcasting Company, Inc. of its options on broadcasting time of its affiliates carrying this program, which options were exercised in order to schedule a commercial program for Canada Dry Ginger Ale, a competitive beverage, the J. Walter Thompson Company, advertising agent for the Ballantine Ale program, gave notice of cancellation of the program, effective December 5, 1941. The licensee's time charges on Station WFBR for broadcasting the Ballantine Ale program during the remainder of the period covered by the contract would have amounted to \$4,095.00 and the net return to the Baltimore Radio Show, Inc., if the program had not been cancelled, would have been \$2,869.89.

At the present time Station WFBR broadcasts 17½ hours of Mutual commercial programs a week, and 11½ hours of the total are carried during the periods that National Broadcasting Company, Inc. has the right to exercise options on the broadcasting time of its affiliates. The contracts calling for the broadcasting of Mutual commercial programs on Station WFBR are cancellable at the end of any 13-week cycle upon four weeks' notice. As of November 1, 1941, the licensee's time charges on Station WFBR for Mutual commercial programs presently arranged for amount to \$96,787.86, and the licensee's time charges for such programs broadcast during the periods that National Broadcasting Company, Inc. has contracted for network

option time of affiliates total \$67,854.36. The net return to Baltimore Radio Show, Inc. on the former sum would be \$67,831.38 and on the latter sum \$47,554.05. A stay of the Commission's regulations will not only cause irreparable injury to the licensee of Station WFBR so far as future network business is concerned, but also will seriously jeopardize the receipt by Baltimore Radio Show, Inc. of the above-stated sum of \$47,554.05 on existing network business.

It is my information and belief that the situation with respect to irreparable injury to the licensee of Station [fol. 350i] WFBR resulting from a stay of the Commission's regulations applies equally to other affiliates of Mutual Broadcasting System, Inc., although, due to differences in rates charged advertisers by such other licensees and the number of network commercial programs broadcast, the extent of the irreparable injury in some instances will be less, and in other instances, greater than that which will be sustained by the licensee of Station WFBR.

Hope H. Barroll, Jr.

Subscribed and sworn to before me this 11th day of December, 1941. Miriam Koontz, Notary Public.
My commission expires February 14, 1946. (Seal.)

[fol. 350j]

EXHIBIT "A"

"February 15, 1940.

Mr. William S. Hedges, Vice President,
National Broadcasting Company,
RCA Building,
New York City.

DEAR BILL:

Mr. Batchelder [Vice President and Treasurer of our station] and I have just completed arrangements to move into our time the program of the Maryland National Guard, in order to clear the time from 9:30 to 10:00 P. M. on Fridays to carry the Procter & Gamble "What's My Name" program during this period. The Maryland National Guard program is an important local sustaining program devoted to recruiting activities which we have been carrying

from 9:45 to 10:00 P. M. Fridays and it has been difficult for us to arrange for the shift to other time. However, since the period involved falls within time optioned for network programs we have arranged to clear it, effective March 1, in order to comply with the terms of our agreement with you.

The Procter & Gamble program is the same program which was at one time scheduled for the period from 7:00 to 7:30 P.M., Saturdays, which time we found impossible to clear at the time due to the program of the City Health Department, another sustaining program of great local importance and one which has been on our station for several years. You will recall that we offered to record this program and broadcast it at another time but the sponsor decided not to use this delayed broadcast and you cancelled the order. The program was then placed on WBAL which apparently proved satisfactory to all concerned until this recent decision to shift the program from Saturdays to Fridays. And, as I said before, we have arranged to clear this time on Fridays in order to make this time available.

I am reviewing and explaining this situation because of the implication contained in the last paragraph of your letter of January 25 relating to the same general subject. It is not our desire to be non-cooperative, but I hasten to point out that both the City Health and National Guard programs are old programs on our station which we regard [fol. 350k] as important public services and both are eager to keep the times assigned to them. Both were assigned to their present periods when these periods were unused by your company. Their reluctance to give up these periods must be readily understood under the circumstances. However, you have a right to the time under the contract and in recognition of that right we have arranged to shift the National Guard program thus making the time available on March 1—the date the Oxydol program is to start.

We did not carry the Pot O' Gold program which you offered for reasons which we made clear to you at the time. While we were advised by our lawyers that they might be able to defend us successfully if the program were ever questioned, we did not feel that we wanted to undertake the risk of making such a defense for a program which we considered to be of doubtful public interest. However, you will recall that even with these doubts, we expressed a willingness to carry the program on condition that your com-

pany would undertake any risks that might be involved. But no useful purpose can be served by going back over this history now, except to say that we felt then and still feel that we were within our rights in not broadcasting this particular program.

If you will examine the relationship which has existed for some years between your Company and WFBR, you will find that WFBR has been very cooperative and we ask that you take this fact into consideration before making such statements as those contained in your letter of January 25.

Yours sincerely, (S.) Hope H. Barroll, Jr., Executive Vice President."

[fol. 351] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR IN OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

DISTRICT OF COLUMBIA, ss:

Telford Taylor, being duly sworn says:

(1) That he is the General Counsel of the Federal Communications Commission;

(2) Attached hereto are certified copies of (a) letter from National Broadcasting Company to a licensee, dated December 10, 1941; (b) page 35 from the applications of National Broadcasting Company and Radio Corporation of America for the assignment of license of Station WENR (file B4-AL-328), giving reasons for the requested assignment; (c) Order of the Commission dated December 23, 1941, approving the assignment of licenses of Stations WJZ, WENR and KGO from National Broadcasting Company to Radio Corporation of America; (d) Order of the Commission dated December 23, 1941, granting the applications of National Broadcasting Company, Inc., and M. A. Leese Radio Corporation for assignment of license of Station WMAL to M. A. Leese Radio Corporation;

(3) Affiant submits that the attached material is relevant on the issues sought to be raised by plaintiffs' Motion for Preliminary Injunction, particularly with respect to Regulations 3.101, 3.106 and 3.107.

Telford Taylor.

Subscribed to and sworn before me this third day of January, 1942. Stephen Tuhy, Jr., Notary Public. My commission expires Oct. 14, 1943. (Seal.)

National Broadcasting Company, Inc.

New York, N. Y.

December 10, 1941.

William S. Hedges, Vice President.

GENTLEMEN :

As you know, we have instituted suit against the Federal Communications Commission for the purpose of securing [fol. 352] a judicial determination of the Commission's power to regulate business practices as attempted by it in its Network Broadcasting Order of May 2, 1941. Although it is the firm position of NBC that the Order is wholly outside the Commission's jurisdiction, NBC does not believe that its position upon this point of law should prevent it from making its own decisions of business policy.

During these times of emergency all of our efforts should be devoted to the maintenance and improvement of our nationwide network broadcasting services which play such an important part in sustaining national morale. NBC has consistently maintained that radio's vital contribution to the national defense will be strengthened by setting aside all disputes not essential to the existence of the industry. This has direct application to our present situation.

The Commission and others have criticized several provisions of our network affiliation contracts. While we believe that all of these provisions are desirable for network operation in the public interest, both from the stations' standpoint and our own, we do not believe that all of them are indispensable. Last summer, you will recall, we deleted some of these provisions from our contracts.

Now we are writing to inform you that NBC has decided to eliminate as a term of network affiliation any obligation pursuant to which an NBC affiliate may not broadcast the

programs of another network at such times as do not conflict with the station's obligation to broadcast NBC programs. You may deem this letter a modification of your contract of network affiliation with us to the extent that such contract may be inconsistent with the foregoing. All other provisions of the contract, including provisions concerning network optional time, remain unchanged.

We firmly believe that the indispensable element in every network affiliation contract is a provision giving the network a firm option on a reasonable amount of time, exercisable on reasonable notice. We do not believe that the provisions of the Network Broadcasting Order permitting so-called "non-exclusive option time" on 56 days notice are workable. Our suit against the Commission seeks to preserve the all-important right to obtain a firm option of the type we regard as essential to the continuance of the present high standard of nationwide network broadcasting.

Very truly yours, National Broadcasting Company,
Inc., by (Signed) William S. Hedges, Vice President.

Certificate

I, T. J. Slowie, Secretary of the Federal Communications Commission, do hereby certify that the attached letter is a true and correct copy of a letter dated December 10, 1941, sent by National Broadcasting Company to a licensee, and filed by it with the Commission pursuant to Section 43.1 of the Commission's Rules and Regulations and Form 335. Similar letters to other licensees are on file with the Commission.

Federal Communications Commission, T. J. Slowie,
Secretary.

Reasons for Assignment

21. (a) Give here the reasons for the proposed assignment, the specific objects sought, and benefits to be attained upon the approval of this application. Upon approval of this application the assignor will be in a position to effect a separation of the business of the station from that of the assignor and the assignee will be in a position and will be willing to comply with the view with respect to the disposition of the station expressed by the Commission in its

report on May 2nd, 1941, in Docket 5060. It is the position of RCA and NBC that the order of the Commission based on its report of May 2nd, 1941, in Docket 5060 is wholly outside the Commission's jurisdiction. RCA and NBC do not believe that their position upon this point of law should prevent them from making their own decisions of business policy. It is believed that the station is presently rendering a high type of public service and this level of service is to be maintained. It is not presently anticipated that any change in service will be made.

22. There are submitted herewith the names and addresses of all counsel (legal, engineering, or accounting), together with the name and address of firm, if any, with which connected, who have prepared, or assisted in the preparation of, the application and exhibits. (Show opposite the name of each the part of application or specific exhibit or exhibits prepared.)

[fol. 354] Authority of any Other Regulatory Agency
Obtained

23. If any part of the proposal involved in this application is subject to regulation or approval by any other Federal or State body, show here the character and status of such proceeding and submit certified copies of all pleadings filed therewith, together with any orders issued by said body. None required

Certificate

I, T. J. Slowie, Secretary of the Federal Communications Commission, do hereby certify that the attached page is a true and correct copy of page 35 from the applications of National Broadcasting Company and Radio Corporation of America for assignment of license of Station WENR (File B4-AL-328) giving the reasons for the requested assignment and that a similar statement is contained in the applications of National Broadcasting Company and Radio Corporation of America for the assignment of licenses of Stations KGO and WJZ (Files B5-AL-326, and B1-AL-327).

Federal Communications Commission, T. J. Slowie
Secretary.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

File Nos. B5-AL-326. B1-AL-327. B1-AL-328

In re Applications of

NATIONAL BROADCASTING COMPANY, INC., Assignor,

and

RADIO CORPORATION OF AMERICA, Assignee,

For Consent to Assignment of Licenses of Stations KGO,
WJZ and WENR

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 23rd day of December, 1941;

The Commission having under consideration the above-described applications; and

[fol. 355] It Appearing that the applicants represent that the transfer of the properties and licenses of Stations KGO, WJZ and WENR, as proposed in these applications, is intended as an initial step toward the segregation of the Blue Network assets of the National Broadcasting Company; that immediate preparations will be made for the transfer of station properties and licenses of Stations KGO, WJZ and WENR to a new subsidiary of Radio Corporation of America; and that these steps are proposed for the purpose of making ultimate disposition of the Blue Network and complying with the views expressed by the Commission in its report of May 2, 1941, Docket 5060; and

It Appearing Further from examination of the applications and the matters submitted in support thereof that the public interest would be served by the granting of the same;

It Is Ordered, That the aforesaid applications Be, and They Are Hereby, Granted.

Federal Communications Commission, T. J. Slowie,
Secretary.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

File No. B1-AL-315. Docket No. 6071

In re Applications of

NATIONAL BROADCASTING CO., INC. (WMAL)

and

M. A. LEESE RADIO CORPORATION

For Assignment of License

and

NATIONAL BROADCASTING CO., INC. (WMAL)

For Renewal of License

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 23rd day of December, 1941;

The Commission having under consideration the petition of The Evening Star Newspaper Company and M. A. Leese [fol. 356] Radio Corporation to reconsider and grant the above-entitled application for assignment of license; and

It Appearing that on February 28, 1933, the Federal Radio Commission granted its consent to the assignment of license for the operation of Station WMAL from M. A. Leese Radio Corporation to the National Broadcasting Co., Inc.; that the National Broadcasting Co., Inc., has since operated said station, using equipment owned and leased to it by M. A. Leese Radio Corporation; that on May 1, 1938, the entire stock of M. A. Leese Radio Corporation was purchased by The Evening Star Newspaper Company; that since May 1, 1938, M. A. Leese Radio Corporation has expended the sum of approximately \$150,000 in new construction and equipment of Station WMAL, such sum having been advanced by The Evening Star Company as the sole stockholder of M. A. Leese Radio Corporation; and that a grant of said application will eliminate the multiple control by National Broadcasting Co., Inc., of radio broadcast stations in Washington, D. C.; and

It Further Appearing upon reexamination of said assignment of license application in the light of the said petition that public interest, convenience and necessity will be served by the granting thereof; and

It Further Appearing that the Commission has hereto-

fore designated for hearing the application for renewal of license for the operation of Station WMAL, and that the assignment of said license to M. A. Leese Radio Corporation eliminates the conditions which caused the Commission to designate said renewal of license application for hearing; and

It Further Appearing upon reexamination of the application for renewal of license of Station WMAL that public interest, convenience and necessity will be served by the granting thereof;

It Is Ordered that the petition for reconsideration and grant of the above-described assignment of license application Be, and It Is Hereby, Granted; and that said application Be, and It Is Hereby, Granted.

It Is Further Ordered, upon the Commission's own motion that the hearing heretofore scheduled upon the above-described renewal of license application for Station WMAL Be, and It Is Hereby, Cancelled; and that said application Be, and It Is Hereby, Granted.

Federal Communications Commission, T. J. Slowie,
Secretary.

[fol. 357] [Endorsed:] United States District Court, Southern District of New York. National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg Carlson Telephone Manufacturing Company, Plaintiffs, vs. United States of America and the Federal Communications Commission, Defendants. Affidavit in Opposition to Plaintiffs' Motion for Preliminary Injunction. Samuel Brodsky, Special Assistant to the Attorney General. Telford Taylor. Thomas E. Harris.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

REPLY AFFIDAVIT OF NILES TRAMMELL

UNITED STATES OF AMERICA,

Southern District of New York,

City, County and State of New York, ss:

Niles Trammell, being duly sworn, deposes and says:

I am the President of the National Broadcasting Company, Inc. (hereinafter called "NBC"), one of the plaintiffs

in this action. This affidavit is made in reply to the affidavits of Fred Weber and Hope H. Barroll, both verified December 11, 1941 and submitted by Mutual Broadcasting System, Inc. in opposition to motions for preliminary injunction,

I

Mutual in the Advertising Market

The Mutual Broadcasting System is not always so down-hearted about its competitive position as Mr. Weber's affidavit would indicate. A document entitled "A Presentation of the Mutual Broadcasting System Spring 1941" issued by Mutual Broadcasting System, states that Mutual Broadcasting System has a 150% advantage over the Blue Network and then continues:

"Mutual has a

24% advantage in
the 1st hundred markets
[fol. 358] 48% advantage in
the 2nd hundred markets
49% advantage in
the 3rd hundred markets

1ST HUNDRED MARKETS

Mutual has a full-time outlet;
NBC Blue has not

Columbus	Ohio
San Antonio	Texas
Nashville	Tenn.
New Haven	Conn.
Springfield	Mass.
Fort Worth	Texas
Grand Rapids	Mich.
Scranton	Pa.
Norfolk	Va.
Wichita	Kans.
Wilmington	Del.
Chattanooga	Tenn.
Knoxville	Tenn.
Fresno	Calif.
Duluth	Minn.
Canton	Ohio
Tacoma	Wash.
Wilkes-Barre	Pa.
Lincoln	Neb.
New Bedford	Mass.

Retail Sales

\$1,099,461,000

Here NBC Blue has a full-time outlet;
Mutual has not

Milwaukee	Wis.
Toledo	Ohio
Richmond	Va.
Miami	Fla.
Youngstown	Ohio
Flint	Mich.
Sacramento	Calif.
Jacksonville	Fla.
Fort Wayne	Ind.
Lansing	Mich.
Erie	Pa.
Tampa	Fla.

Retail Sales

\$885,755,000

2ND HUNDRED MARKETS

Mutual has a full-time outlet;
NBC Blue has not

Waterbury	Conn.
Little Rock	Ark.
Rockford	Ill.
Fall River	Mass.
Lowell	Mass.
Roanoke	Va.
Austin	Texas
Huntington	W. Va.
Lexington	Ky.
Mobile	Ala.
Winston-Salem	N. C.
Elmira	New York
Macon	Ga.
San Bernardino	Calif.
Yakima	Wash.
Steubenville	Ohio
Greenville	S. C.
Waco	Texas
Raleigh	N. C.
Pittsfield	Mass.

Retail Sales

\$485,418,000

Here NBC Blue has a full-time outlet;
Mutual has not

Stockton	Calif.
Evansville	Ind.
Wheeling	W. Va.
Springfield	Ill.
Manchester	N. H.
Sioux City	Iowa
Terre Haute	Ind.
Columbia	S. C.
Poughkeepsie	New York
Augusta	Ga.
Jackson	Mich.
Battle Creek	Mich.
Jackson	Miss.

Retail Sales

\$327,112,000

[fol. 359]

3RD HUNDRED MARKETS

Mutual has a full-time outlet;
NBC Blue has not

Amarillo	Tex.
Easton	Pa.
Fargo	N. D.
Lynchburg	Va.
Lewiston	Maine
New London	Conn.
Santa Ana	Calif.
Portsmouth	Ohio
Hagerstown	Md.
Danville	Va.
Bellingham	Wash.
Everett	Wash.

Retail Sales

\$185,893,000

NBC Blue has a full-time outlet;
Mutual has not

Orlando	Fla.
Johnstown	New York
Reno	Nev.
Baton Rouge	La.
Pueblo	Colo.
Bay City	Mich.
Spartanburg	S. C.
Enid	Okla.

Retail Sales

\$124,541,000

Naturally you will want to ask this question
with *twice* the popularity in the leading 32 cities
with coverage of *more* of the leading 300 markets
will Mutual this fall be more expensive than its Blue competition?

The answer is . . . NO."

II

The Network Affiliation "Market"

It is time that the true situation with respect to the network affiliation "market" be made clear.

The Mutual Broadcasting System attained the status of a nationwide network organization in 1936. Since that date practically every station now affiliated with NBC has entered into its present contract with NBC and each of these stations was free to affiliate itself with Mutual or any other network organization had it so desired.

Since 1938 affiliation contracts between NBC and approximately 80 radio stations then affiliated with NBC have expired and the stations have had a choice of affiliation. From October 1, 1938 through the end of 1941, NBC entered into contracts of affiliation with approximately 100 additional stations, which of course were free to affiliate themselves with any other network organization. Since 1938 only five former affiliates of the NBC have chosen to leave NBC for the Mutual Broadcasting System. These stations are located in

Boston
 Providence
 [fol. 360] Bridgeport
 Baltimore
 Pittsburgh

These facts speak for themselves.

III

Baltimore Radio Show, Inc. and Station WFBR

In his affidavit verified December 11, 1941, Mr. Hope H. Barroll, Executive Vice President of Baltimore Radio Show, Inc., contends that NBC had the power under its affiliation contract with Baltimore Radio Show, Inc. to switch its Station WFBR from the Red Network to the Blue Network.

It should first be pointed out that *never* in the history of the National Broadcasting Company, has an affiliate been shifted from one of the NBC networks to another during the life of its contract against its wish. No effort was made in the case of Station WFBR to shift it from the Red Network to the Blue Network during the life of its contract which expired on September 30, 1941.

Upon the expiration of its affiliation contract, Station WFBR became affiliated with Mutual Broadcasting System. This change of affiliation from NBC to Mutual is an example of competition between network organizations for affiliated

stations. An endeavor to make more than this of the case of WFBR is to totally disregard the commercial facts surrounding that situation.

For a considerable time prior to this change in affiliation Station WFBR had been dissatisfied with its network rate to advertisers upon which its compensation for the broadcasting of network commercial programs was based. Its network rate had initially been set at \$240 per hour and this was in excess of the rate warranted by its coverage when compared with other stations on the Red Network. Upon obtaining a grant of increase in power which made its network rate of \$240 per hour the usual rate for a station of the coverage which such increased power brought, the station felt dissatisfied and wanted an increase of \$60. This increase was not warranted by the coverage of Station WFBR when compared with other stations on the Red Network. NBC was willing to increase the network rate of Station WFBR by \$20, and did so. In spite of this increase, Station WFBR became increasingly dissatisfied with its network rate.

[fol. 361] The coverage of the NBC Red Network stations in Washington and in Philadelphia was such that the duplicated coverage of Station WFBR was considerably greater on the Red Network than it would have been had WFBR been on the Blue Network. NBC was consequently able to offer Station WFBR a higher network rate on the Blue Network. This, however, also was unsatisfactory to Station WFBR.

It was after the increase of \$20 an hour (when WFBR felt entitled to a \$60 increase) that there were increasing numbers of instances in which the station placed difficulties in the way of the exercise by NBC of options upon the station's time. It will be recalled that the time subject to options on the majority of NBC affiliates, including Station WFBR, is only 8½ hours per day, leaving ample time in which the affiliates, including Station WFBR, can schedule programs of local importance. NBC is currently utilizing 83.1% of the 8½ hours per day subject to option on the basic Red Network for network commercial programs. The amount of option time utilized by a network organization for a nationwide network commercial program varies from network to network. For example, on the basic Blue Network the 8½ hours subject to option are utilized only about

half as much for the broadcasting of network commercial programs as on the Red. Any station choosing to affiliate itself with the Red Network must, therefore, expect heavy network commercial traffic within network option time. This is generally understood in the industry and, as it is amply remunerative to the affiliates, it is rare to find an affiliate on the Red Network endangering a program to the whole network by refusing to respect its contractual obligation.

IV

Distribution of Facilities Among Network Organizations

The affidavit of Fred Weber, submitted on behalf of the Mutual Broadcasting System, Intervenor, seeks to indicate that the Mutual System has been prevented by NBC and CBS from obtaining outlets in various radio markets. The true facts of the matter can readily be made clear.

The United States Census of 1940 defined 140 metropolitan areas. These areas represent the most important [fol. 362] population centers in the United States and range in population from the New York metropolitan area, which includes such cities as Elizabeth, Jersey City, Newark, Paterson and Yonkers in addition to the five boroughs and which has a population of 11,690,520, to the 140th in rank, Amarillo, Texas, which has a total population of 53,463. It can readily be seen that there is a wide divergence in the station power required to cover the various 140 metropolitan areas.

In general, stations of high power are probably essential only for those areas having populations in excess of 500,000. The areas of lesser population can, with very few exceptions, be adequately covered by a 250 watt station.

Neither the Red Network of NBC nor the Blue Network has stations of high power in all of these 140 metropolitan areas. In fact the Red Network has a 250 watt station which it shares with the Blue in one area having a population of 629,581 while the Blue Network uses 250 watt stations in three of the areas having a population of 500,000 or greater. Mutual also uses stations of 250 watt power in three such areas. In the Scranton-Wilkes-Barre area Mutual is affiliated with one 250 watt station and one 100 watt station, while the Red and the Blue Networks share one 250 watt station located in Wilkes-Barre, Pennsylvania.

However, in so far as Mr. Weber's affidavit complains of the existing situation with respect to power, his complaint must be directed to the Federal Communications Commission, which alone has authority to change that situation. The attack of Mr. Weber upon the other network organizations must, therefore, be confined to the charge that the other network organizations have, as affiliates, an undue proportion of available outlets. The following table shows the numerical distribution of outlets in the 140 first metropolitan areas.

Metropolitan Areas	Red Network	Blue Network	CBS	Mutual
1st 25.....	25	26	26	29
2nd 25.....	16	20	19	21
3rd 25.....	15	17	15	17
4th 25.....	15	15	14	13
5th 25.....	12	12	12	9
Next 15.....	4	4	6	5
Total.....	87	95	92	94

[fol. 363] In these 140 areas there are 53 in which the Red Network does not have an affiliated station. There are 47 areas in which the Blue Network does not have an affiliated station and there are 52 areas in which Mutual does not have an affiliated station. NBC has never considered and its experience shows that it is not essential to network operation to have an affiliated station in every one of these high population centers. It is quite probable that, even though stations were available in many of the population centers in which neither the Red Network nor the Blue Network has an affiliated station, NBC would not desire to enter into contractual agreements with such stations because of problems of overlapping coverage. Neither do I believe that Mutual would desire to have an affiliated station in each of the first 140 metropolitan areas.

In only one of the first 25 markets, Milwaukee, Wisconsin, does Mutual lack an outlet and the Milwaukee outlet was available to Mutual prior to its affiliation with the Blue Network. From that fact it can be presumed that Mutual did not desire to affiliate with the station because coverage of their 50,000 watt station in Chicago, WGN, was regarded as perfectly satisfactory for this market.

In his affidavit Mr. Weber enumerated the cities in which the Red Network and the Blue Network or both have contracts with stations but in which he alleges Mutual is unable

to obtain an outlet. For the purpose of comparison there are enumerated below the 24 cities in the first 140 metropolitan areas in which Mutual has an outlet but in which the Red Network does not have an outlet:

Scranton
 Rochester
 Springfield-Holyoke
 Akron
 Lowell-Lawrence
 New Haven
 Fall River-New Bedford
 San Diego
 Canton
 Moline-Davenport-Rock Island
 Huntington-Ashland
 Tacoma
 Binghamton
 Waterbury
 [fol. 364] Beaumont-Port Arthur
 San Jose
 Roanoke
 Austin
 Rockford
 Lincoln
 Sioux City
 Macon
 Cedar Rapids
 Waco

The following list of 22 cities in the first 140 metropolitan areas are those in which Mutual has an outlet but in which the Blue Network does not have an outlet:

Scranton
 Lowell-Lawrence
 San Antonio
 New Haven
 Fall River-New Bedford
 Canton
 Wilmington
 Huntington-Ashland
 Tacoma
 Binghamton
 Waterbury

San Jose
 Mobile
 Roanoke
 Winston-Salem
 Austin
 Rockford
 Lincoln
 Macon
 Cedar Rapids
 Waco
 Amarillo

For the purpose of further comparison there are enumerated below the cities in the first 140 population centers in which the Red Network has no affiliated station, the cities in which the Blue Network has no affiliated station and the cities in which the Mutual Network has no affiliated station:

[fol. 365] Red	Blue	Mutual
Rochester	Lowell-Lawrence-	Milwaukee
Springfield-Holyoke	Haverhill	Youngstown
Youngstown	San Antonio	Toledo
Akron	New Haven	Worcester
Lowell-Lawrence-	Worcester	Dayton
Haverhill	Fall River-New Bedford	Miami
New Haven	Canton	Salt Lake City
Fall River-New Bedford	Trenton	Trenton
Dayton	Utica-Rome	Utica-Rome
San Diego	Wilmington	Wheeling
Bridgeport	Reading	Flint
Canton	Huntington-Ashland	Reading
Trenton	Peoria	Peoria
Utica-Rome	Tacoma	Sacramento
Wheeling	Johnstown	Saginaw-Bay City
Flint	South Bend	Johnstown
Moline-Davenport-	Binghamton	South Bend
Rock Island	Waterbury	Charleston (W. Va.)
Huntington-Ashland	Racine-Kenosha	Racine-Kenosha
Peoria	San Jose	Fort Wayne
Sacramento	Savannah	Erie
Tacoma	Mobile	Phoenix
Saginaw-Bay City	Altoona	Savannah
South Bend	Hamilton-Middletown	El Paso
Binghamton	Shreveport	Altoona
Waterbury	Roanoke	Hamilton-Middletown
Beaumont-Port Arthur	Winston-Salem	Shreveport
Racine-Kenosha	Portland	Lansing
Erie	Austin	Portland
San Jose	Rockford	Atlantic City
Hamilton-Middletown	Atlantic City	Charleston
Roanoke	Charleston	Fresno
Lansing	Fresno	Montgomery
Austin	Columbus	Columbus
Rockford	Lincoln	Springfield (Ill.)

Red	Blue	Mutual
Atlantic City	St. Joseph	Jackson
Columbus	Topeka	Augusta
Springfield (Ill.)	Kalamazoo	St. Joseph
Lincoln	Asheville	Terre Haute
Augusta	Macon	Stockton
Sioux City	Cedar Rapids	Madison
St. Joseph	Greensboro	Topeka
Stockton	Galveston	Springfield (O.)
Topeka	Waco	Kalamazoo
Springfield (O.)	Durham	Asheville
Kalamazoo	Waterloo	Greensboro
Macon	Decatur	Galveston
Cedar Rapids	Amarillo	Springfield (Mo.)
Greensboro		Durham
Galveston		Waterloo
Waco		Decatur
Durham		Pueblo
Waterloo		
Decatur		
Pueblo		

In order to complete the presentation there is shown below the list of cities in which the Red Network stations also take Mutual programs; the cities in which the Blue Network stations also take Mutual programs, and the [fol. 366] cities in which both the Red and Blue Network stations also take Mutual programs:

Red—	Charlotte
	Manchester
Blue—	Cleveland
	Providence
	Houston
	Birmingham
	Memphis
	Richmond
	Bridgeport
	Jacksonville
	Tulsa
	Des Moines
	Spokane
	Columbia
Red-Blue—	Harrisburg
	Evansville
	Lancaster
	York
	Corpus Christi

Finally there is tabulated below the 18 cities in which the Red and Blue Networks share stations:

Scranton-Wilkes-Barre
Columbus (O.)
Allentown-Bethlehem-Easton
Norfolk
Syracuse /
Nashville
Grand Rapids
Chattanooga
Duluth-Superior
Knoxville
Charleston (W. Va.)
Wichita
Phoenix
El Paso
Montgomery
Terre Haute
Madison
Springfield (Mo.)

[fol. 367] Discussion of population centers which do not come within the 140 metropolitan areas of the United States as defined by the United States Census is omitted from this affidavit. It is inconceivable that the failure of a network to have an affiliate in population centers of this importance would seriously affect its competitive position. However, it should be noted that in the population centers of less than 50,000 the Red Network has a total of 45 affiliates; the Blue Network has a total of 68 affiliates, while the Mutual Network has a total of 95 affiliates. Here again the total for the Red and the total for the Blue include 25 stations utilizing both the Red and Blue Networks.

V

Limitations Upon Facilities

The chief factor limiting the numbers of standard broadcast stations in the United States is that of interference. The considerations governing the Federal Communications Commission in determining the amount of interference compatible with the public interest, convenience and necessity are set forth in standards of good engineering prac-

tice promulgated by it. It is contended that the present number of cities in the United States having three or less full-time facilities is the inevitable and unalterable result of physical limitations.

For example, the limitation of facilities in Cleveland, which has three full-time stations and one part-time station, has been cited as an illustration of physical limitation upon possible standard broadcast facilities. However, the Commission has denied applications for additional facilities in Cleveland on the ground of technical limitations where the limitations relied upon have been repeatedly exceeded in subsequent grants in other cities. Indeed, these technical limitations have been exceeded by the Commission in over 40 cases, often to a much greater extent than would be necessary in Cleveland.

In one case filed November 21, 1936, the Commission, on March 9, 1938, denied an application for a regional station in Cleveland. Although the Commission purported to rely on technical grounds, it further held in this case and I quote:

"The area which the station proposes to serve now has program service from a number of existing stations." (

[fol. 368] and that:

"No such need is shown for additional broadcasting service as will warrant the establishment of an additional regional station, which because of interference, will be unable to serve as extensive an area as is normally expected to be served by a station of this class."

In another case, decided that same year, 1938, although the Commission found the applicant to be legally, technically and financially qualified to construct and operate the proposed station in Cleveland, it held that:

"The frequencies available for assignment to broadcast stations being limited, public interest would be served by an allocation of licenses to those who will, where need exists, render a broad, general public service."

and the Commission further held that:

"No need exists for an additional station in the area which would be served upon the basis of program service proposed to be rendered."

Therefore the Commission ruled that:

"Public interest, convenience and necessity will not be served by a granting of the application."

In a third case when the application for a regional station in Cleveland was denied on June 29, 1938, the Commission concluded; and again I quote:

"The granting of this application would not cause objectionable interference to any established station. However, interference from existing stations would be expected to limit coverage of the proposed station to its 4.7 millivolt contour at night."

My engineers inform me that this limitation has since been frequently exceeded in other locations.

The Commission went on to say:

"While the evidence indicated that there *may* be need for an additional station in Cleveland, the degree of need shown by the applicant for this station is not of such a convincing and compelling nature as to warrant the Commission in departing so radically from standards of allocation and service which have been established as primary elements in determining whether a particular station would [fol. 369] serve the public interest, convenience and necessity, from the standpoint of the nation as a whole."

There are now applications pending for facilities in Cleveland, according to our examination of the record, the granting of which would give Cleveland six full-time stations. No action has been taken by the Commission on these applications.

If these applications are granted, Cleveland will have ample facilities. But if none is granted, NBC could be required, under the new regulations, to dispose of its only station in Cleveland, Station WTAM, which it has operated in the public interest for twelve years.

As further proof of the fact that there is no absolute limitation upon the possible number of facilities and of the fact that the radio art is dynamic and expanding, Table 1 shows the increase in the number of cities having five full-time stations, Table 2 shows the increase in the number of cities having four full-time stations, and Table 3 shows the increase in the number of cities having three full-time stations, progressively from 1938 to 1941.

TABLE 1
Cities with 5 or More Stations

1938	1939	1940	1941
Boston	.	.	.
Buffalo	.	.	.
Chicago	.	.	.
Cincinnati	.	.	.
Dallas-Ft. Worth	.	.	.
Detroit	.	.	.
Kansas City	.	.	.
Los Angeles	.	.	.
Milwaukee ¹	.	.	.
New York	.	.	.
Philadelphia	.	.	.
Pittsburgh	.	.	.
Portland	.	.	.
San Francisco	.	.	.
Seattle	.	.	.
St. Louis	.	.	.
Denver	.	.	.
Minneapolis-St. Paul	.	.	.
New Orleans	.	.	.
		Baltimore	.
		Bridgeport-New	.
		Haven-Waterbury	.
		Springfield-Holyoke ²	.
		Tacoma	.
		Washington, D. C.	.
		Everett, Wash.	.

¹ WMAQ, WENR-WLS, WBBM and WGN—Chicago deliver primary service in Milwaukee.

² WTIC—Hartford delivers primary service in Springfield-Holyoke.

[fol. 370]

TABLE 2
Cities with 4 Stations
(Absence of ditto denotes transference to Table 1)

1938	1939	1940	1941
Atlanta, Ga.	.	.	.
Hartford	.	.	.
Memphis	.	.	.
Oklahoma City	.	.	.
Salt Lake-Ogden	.	.	.
San Antonio	.	.	.
Baltimore	.	.	.
Minneapolis-St. Paul	.	.	.
New Orleans	.	.	.
Richmond, Va.	.	.	.
Washington, D. C.	.	.	.
	Louisville	.	.
	Bridgeport-New	.	.
	Haven-Waterbury	.	.
	Tacoma	.	.
		Akron, O. ¹	.
		Albany	.
		Indianapolis	.
		Providence	.
		Scranton-Wilkes B.	.
		Syracuse	.
		Tampa-St. Pete.	.
		Winston-Salem-HP-G.	.
		Little Rock, Ark.	.
		Youngstown ²	.

¹ WTAM—Cleveland delivers primary service in Akron.

² WTAM—Cleveland delivers primary service in Youngstown.

[fol. 371]

TABLE 3

Cities with 3 Stations

(Absence of ditto denotes transference to Tables 1 or 2)

1938	1939	1940	1941
Birmingham	"	"	"
Cleveland	"	"	"
Dayton ¹	"	"	"
Des Moines	"	"	"
Houston	"	"	"
Miami	"	"	"
Nashville	"	"	"
Norfolk ²	"	"	"
Rochester, N. Y.	"	"	"
Shreveport	"	"	"
Spokane	"	"	"
Little Rock	"	"	"
Akron ³	"	"	"
Albany	"	"	"
Providence	"	"	"
Seranton	"	"	"
Denver	"	"	"
Bridgeport	"	"	"
Tacoma	"	"	"
Beaumont-Port Arthur	"	"	"
Duluth-Superior	"	"	"
Fresno	"	"	"
Jacksonville	"	"	"
Suffolk, Va.	"	"	"
Toledo ⁴	"	"	"
Tulsa	"	"	"
Wilmington, Del. ⁵	"	"	"
Springfield, Mass.	"	"	"
Syracuse	"	"	"
Tampa-St. Petersburg	"	"	"
Winston-Salem, N. C.	"	"	"
Chattanooga	"	"	"
Grand Rapids	"	"	"
Knoxville	"	"	"
Omaha ⁶	"	"	"
Phoenix	"	"	"
Richmond	"	"	"
San Diego	"	"	"
Wichita	"	"	"
Everett	"	"	"
Augusta, Ga.	"	"	"
Worcester ⁷	"	"	"
Brownsville, Tex.	"	"	"
Charlotte, N. C.	"	"	"
San Juan, P. R.	"	"	"
Wheeling ⁸	"	"	"

¹ WLW—Cincinnati delivers primary service in Dayton.² WRVA—Richmond delivers primary service in Norfolk.³ WTAM—Cleveland delivers primary service in Akron.⁴ KFAB—Lincoln delivers primary service in Omaha.⁵ WJR—Detroit delivers primary service in Toledo.⁶ WCAU—Philadelphia delivers primary service in Wilmington.⁷ WBZ—Boston delivers primary service in Worcester.⁸ KDKA—Pittsburgh delivers primary service in Wheeling.

NILES TRAMMELL

Subscribed and sworn to before me

this 10th day of January, 1942.

DOMINICK J. MAGGIPIRTO

Notary Public—Richmond County

N. Y. Co. Reg. No. 3M805, Clk's No. 1275

Commission Expires March 30, 1943

[SEAL]

[fol. 372] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

REPLY AFFIDAVIT OF EDGAR KOBAK

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

Edgar Kobak, being duly sworn, deposes and says:

For approximately the past year and a half I have been Vice President of the National Broadcasting Company, Inc., in charge of sales on the Blue Network. This affidavit is submitted to correct statements made in the affidavit of Fred Weber, submitted on behalf of the Mutual Broadcasting System, Inc., Intervenor, with respect to the Ballantine program and the March-of-Time program.

The Weber affidavit unfairly ascribes practically every piece of business which Mutual has lost to the operation of NBC affiliation contracts. The theory seems to be that otherwise Mutual would have all the business. That is not the fact. The prestige of the networks of the National Broadcasting Company and the audiences attracted by its programs are such that advertisers throughout the years have shown a decided preference for the use of its facilities. The following recital of the two accounts gone into in great detail by Mr. Weber, is to show that in each instance Mutual did not get or keep the business solely and only because the advertisers preferred the NBC networks.

The Weber affidavit is designed to give the further impression that Mutual is in a precarious position, by stressing the fear it has of losing other accounts. The fact of the matter is, of course, that Mutual has a great amount of other business not referred to in the Weber affidavit and currently represents itself as follows:

"In 1940 Mutual billing increased at the fastest rate of any network since 1935. For the *sixth straight* year the curve of this network success was a steady upward line."

On January 8, 1942 Mutual advertised itself as having a 53% gain in total billings in 1941 over 1940.

[fol. 373]

The Ballantine Program .

NBC's policies as to the acceptance or rejection of programs are constantly being revised. This necessarily is so because changing public tastes and standards require that in a dynamic business the program policies keep pace with such changes. Changes in program policies are not restricted to the commercial field but extend into the sustaining field. So in the matter of beer accounts, NBC did have a policy against such advertising. Before the J. Walter Thompson Company, the advertising agency representing Ballantine & Sons, ever went to the Mutual Broadcasting System, they inquired of NBC whether it would accept beer advertising. NBC at that time informed the J. Walter Thompson agency that it would not. Thereupon, the agency asked NBC to let them know if at any time thereafter NBC changed its policy in regard to beer.

The Ballantine account was not the only beer account that besought NBC to change its policy. These requests caused the NBC makers of policy to review the policy in this regard. Several months thereafter, in fact about the end of October, 1941, NBC decided that it would accept beer accounts on its Blue network. In compliance with the request of the agency, made months before, NBC informed it of this change. Thereupon the agency stated that it would much prefer to be on the NBC Blue network to the Mutual network and had gone to Mutual only because at the time NBC would not accept beer advertising. The Ballantine program thereafter came to the Blue network for the reason that the Blue network was preferable to it over the Mutual network and for no other reason.

The complete answer to Mr. Weber's plaint in this matter that Mutual lost this business because of NBC's option time arrangements is found in the fact that it was necessary for the Ballantine Company to accept delayed broadcasts on seven NBC Blue stations. Even after the scheduling of the Canada Dry program on the NBC Blue, to which Weber refers, Mutual had delayed broadcasts on the Ballantine program on only ten stations. It cannot seriously be contended that the difference between delayed broadcasts on ten as distinguished from seven stations caused this account to shift its advertising.

[for 374] The March of Time Program

This program is one of the most interesting news dramatization programs on the air. Mr. Weber fails to point out that it had been on the Blue Network of NBC for a year and a half until the owners of Time, Inc., discontinued radio programs in 1939. When in 1941 Time, Inc., decided to resume its radio program, quite naturally it approached the Blue Network of NBC before it approached Mutual.

NBC had, meanwhile, adopted a policy against the dramatization of war news. Time, Inc. requested NBC to reconsider. While the reconsideration was under way, Time, Inc., negotiated with Mutual. When NBC decided to change its policy in respect of such dramatization, it so informed Time, Inc. and accepted the March of Time program.

NBC did not in any way intimate to Young & Rubicam, the advertising agency for Time, Inc. or to Time, Inc. itself that NBC would attempt to block the scheduling of the March of Time program on the Mutual network. Time, Inc. understandably preferred the Blue Network because among other favorable factors, its program had been broadcast over that network before and it knew what service it could expect from the Blue Network.

The Clark Candy Company program, to which Mr. Weber refers, was scheduled for Thursday night from 8 to 8:30 p. m. on the Blue network before the March of Time program was accepted and without regard to that program. After NBC had accepted the March of Time program, Young & Rubicam asked NBC to request the Clark Candy Company to change its time to 8:30 to 9 p. m. on Thursday nights, following the March of Time program. This request was made because the later period was sufficiently suitable for the Clark Company's desires, whereas it was unsuitable to Young & Rubicam because that agency had another program in the earlier period on another network and did not wish to create competition between its own two programs.

It would be entirely possible to go through each of the other programs referred to by Mr. Weber in his affidavit and show that in each and every instance the reason for the preference for the networks of NBC was the opinion of the advertisers that they are the superior networks and have affiliated with them stations whose good will built up over the years is also of the highest.

The competition for business between all the networks is keen. If NBC's option time arrangements had the effect which Mr. Weber attempts to ascribe to them, it would seem impossible for Mutual ever to get a program so long as there was time available on the NBC Blue. Yet Mutual advertises itself as the fastest growing network.

Edgar Kobak.

Subscribed and sworn to before me this 9th day of January, 1942. Dominick J. Maggipinto, Notary Public, Richmond County, N. Y. Co. Reg. No. 3M805, Clk's No. 1275. Commission Expires March 30, 1943.

[fol. 374a] IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HAROLD C. READ, PROGRAM SERVICE MANAGER
OF THE LONG LINES DEPARTMENT OF THE AMERICAN TELE-
PHONE AND TELEGRAPH COMPANY

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

HAROLD C. READ, being duly sworn, deposes and says:

I am Program Service Manager of the Long Lines Department of the American Telephone and Telegraph Company. On the 25th day of November, 1941, I made an affidavit in the above entitled matter at the request of the Federal Communications Commission relative to the establishment of a network of 64 stations for a one-half hour program once a week giving the charges therefor and information as to the availability of the necessary facilities. [fol. 374b] All the charges included in said affidavit were based on the use of Schedule "B" facilities throughout. It would be possible to establish a network connecting the 64 points in question using a combination of Schedule "B" facilities and facilities of a lower grade, provided the necessary facilities were available, and provided the combination of the facilities would meet the service requirements. The

charges for the lower grade facilities are somewhat lower than the charges for Schedule "B" facilities.

Schedule "B" provides for the occasional use of program transmission facilities and the charge is for a minimum period of one hour. At the same charges mentioned in my said affidavit, two consecutive half-hour programs or four consecutive quarter-hour programs per week could be transmitted assuming the same point of origin, the same network and the same customer.

Schedule "A" provides for the continuous use of program transmission facilities of the same grade as Schedule "B" for contract periods of 16 or more consecutive hours of use per day, for a minimum period of one month. In accordance with the Telephone Company's Tariff F. C. C. No. 198, when, within a period of one month, the charges for any section of a network at Schedule "B" rates equal or exceed those that would be obtained by applying to such section the rates for Schedule "A" facilities and services, such section is charged for in accordance with the rates applicable to Schedule "A". Therefore, the number of hours of Schedule "B" service required by a customer may be sufficient so that at no additional costs he can obtain the facilities for a longer period under Schedule "A", assuming the same point of origin and the same arrangement of facilities. In general, if more than about forty hours per month of Schedule "B" service is taken, the costs to the customer are the same for Schedule "B" as for Schedule "A" service.

We have furnished Schedule "B" service on a recurring basis, on many occasions in the past, to provide program service to numerous stations located in various sections of the country.

[fol. 374c] This affidavit is made at the request of the National Broadcasting Company.

Harold C. Read, Program Service Manager

Subscribed and sworn to before me this 9th day of January, 1942. William John Keener, Notary Public, Nassau County No. 833. Cert. filed in N. Y. County N. Y. Co. Clk's No. 130, Reg. No. 2K-112. Commission expires March 30, 1942. (Seal.)

[fol. 375] IN DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTIONS TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT

Upon the complaint herein and upon the annexed affidavits of Telford Taylor, verified the 5th day of November, 1941, and exhibit referred to therein and filed therewith, and of William P. Massing, verified the 5th day of November, 1941, and upon all the other papers and proceedings heretofore filed and had herein, the defendants in the above-entitled cause move this Court to dismiss the complaint or, in the alternative, for summary judgment in their favor.

The grounds of the motions are:

1. The Court lacks jurisdiction of the subject matter of this action either under any special statutory provisions such as are referred to in the preamble to the complaint, or under the general equity jurisdiction of the Court, or otherwise.

2. Insofar as this action is brought under the general equity jurisdiction of the Court rather than under special statutory authorization, this is a suit against the United States and the United States has not consented to be sued.

3. Insofar as this action is brought under the general equity jurisdiction of the Court rather than under special [fol. 376] statutory authorization, this action was improperly brought in the Southern District of New York and cannot properly be brought in the Southern District of New York because the defendants were not and are not inhabitants of the Southern District of New York.

4. Insofar as this action is brought under the general equity jurisdiction of the Court rather than under special statutory authorization, the service on the defendants was invalid because the summons herein was served in the District of Columbia, to which the process of this Court does not extend in this action, and the defendants were not served within the Southern District of New York or within the State of New York.

5. The complaint fails to state a claim upon which relief can be granted.

6. Even if the Court have jurisdiction of the subject matter of this action, the pleadings and other papers on file and the affidavits submitted on these motions and exhibit referred to therein and filed therewith show that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law.

Dated: Washington, D. C., November 7, 1941.

(S.) Samuel Brodsky, Attorney for the United States of America, United States Court House, Foley Square, New York, N. Y. (S.) Telford Taylor, Thomas E. Harris, Attorneys for Federal Communications Commission, 7528 New Post Office Building, Washington, D. C.

IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR

DISTRICT OF COLUMBIA, ss:

Telford Taylor, being duly sworn, says:

1. He is General Counsel of the Federal Communications Commission and as such is familiar with the Commission's [fol. 377] proceedings taken under Order No. 37, Docket No. 5060, and that the proceedings include the following:

(a) The Federal Communications Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity." On April 6, 1938, a committee of three Commissioners was appointed by the Commission to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission."

(b) Between November 14, 1938, and May 19, 1939, the committee held hearings pursuant to public notice that the

Commission would hear any person or organization desiring to present evidence on the matters included for investigation in Commission Order No. 37. The committee requested the national networks, regional networks, station licensees, and transcription and recording companies to present evidence. It also requested information by questionnaire from licensees of stations and from holders of stock in licensee corporations. In addition, persons and organizations requesting an opportunity to present evidence material to the investigation were given an opportunity to be heard. In all, the committee actually heard witnesses on 73 days during this 6-month period. Ninety-six witnesses were heard. Their evidence fills 8,713 pages of transcript. Seven hundred and seven exhibits were introduced. The testimony and exhibits fill 27 large volumes.

(c) Twenty of the ninety-six witnesses were called by the National Broadcasting Co.; they testified for the equivalent of more than 24 hearing days. Their testimony fills 3,225 of the 8,713 pages of transcript. They introduced 227 of the 707 exhibits. The testimony of one National Broadcasting Company witness, David Sarnoff, president of the Radio Corporation of America and chairman of the Board of the National Broadcasting Company, fills 200 pages.

(d) Seventeen witnesses appeared on behalf of the Columbia Broadcasting System. They testified for the equivalent of more than 16 hearing days. Their testimony fills 2,180 pages of the transcript and they introduced 186 exhibits. The testimony of the president of the Columbia Broadcasting System fills 130 pages of the transcript.

(e) Eight witnesses for the Mutual Broadcasting System testified for the equivalent of more than 6 hearing days, filling 670 pages of the transcript and introducing 53 exhibits.

(f) On June 12, 1940, the committee issued its report based upon the evidence adduced at the hearings and the official records of the Commission.

(g) In November 1940 briefs in the proceeding were filed on behalf of National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System and other interested parties. On December 2 and 3, 1940,

oral arguments before the full Commission were presented by the parties. These arguments were directed to the committee report and to certain draft regulations issued for the purpose of giving scope and direction to the oral arguments. On January 2, 1941, supplementary briefs were filed on behalf of National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System in which were discussed the jurisdiction of the Commission with respect to matters covered by the committee report and the draft regulations, and in which attention was given to the actual and feasible limits of competition in the broadcasting field, with particular reference to network broadcasting.

(h) On May 2, 1941, the Commission issued its report setting forth its findings and conclusions in the proceeding, together with an order adopting eight regulations (Regulations 3.101 to 3.108 inclusive) setting forth policies which the Commission would thereafter apply in exercising its licensing functions. Two of the seven Commissioners filed additional views dissenting from the action taken by the Commission. The effective date of the regulations was deferred for 90 days from the date of the order with respect to existing contracts, arrangements, or understandings, or network organization station licenses, and further provision was made for extension of the effective date of Regulation 3.106 in order to permit the orderly disposition of properties. On June 13, 1941, the Commission provided for the postponement for 90 days from May 2, 1941 of Regulation 3.107, and for further postponement of the [fol. 379] effective date of that regulation in order to permit the orderly disposition of properties. On July 22, 1941, the effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses, or the maintenance of more than one network by a single network organization was again deferred until September 16, 1941, and on August 28, 1941, said effective date was postponed until after the disposition of the petition of the Mutual Broadcasting System to amend Regulations 3.103 and 3.104.

(i) On August 14, 1941, the Mutual Broadcasting System petitioned the Commission to amend two of the regulations, 3.103 and 3.104. Upon this petition the Commission called for briefs and oral argument by interested parties.

Briefs were filed by National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System and by one regional network organization and oral argument was had before the Commission on September 12, 1941. Thereafter, on October 11, 1941, the Commission issued a Supplemental Report on Chain Broadcasting (two of the six Commissioners dissenting) together with amendments to three of the regulations (3.102, 3.103, and 3.104). The Commission simultaneously postponed the effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses until November 15, 1941, and suspended the effective date of Regulation 3.107 indefinitely, with the provision that any subsequent order of the Commission placing Regulation 3.107 in effect should provide for not less than six months' notice and for further extension of its effective date from time to time in order to permit the orderly disposition of properties.

(j) On October 31, 1941, the Commission issued its minute setting forth the procedure to be followed in applying the Chain Broadcasting Regulations. Said minute reads as follows:

"If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the [fol. 380] Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

"The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of

that portion of Regulation 3.106 relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

"The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations."

2. A certified copy of said proceedings before the Commission in connection with Order No. 37, Docket No. 5060, is filed herewith and incorporated herein by reference as Exhibit A.

3. One of the grounds on which plaintiffs contend that the action of the Commission promulgating the Chain Broadcasting Regulations is invalid is that the regulations are "arbitrary and capricious and contrary to the public interest." Affiant submits that Exhibit A is relevant on that issue sought to be raised and that it shows that the regulations are not arbitrary or capricious but that they are in the public interest, and that there is no genuine issue as to any material fact.

(S.) Telford Taylor.

Subscribed and sworn to before me this 5th day of November, 1941. (S.) Pansy E. Wiltshire, Notary Public, D. C. My commission expires October 31, 1945. (Seal.)

[fol. 381] IN DISTRICT COURT OF UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF WILLIAM P. MASSING

DISTRICT OF COLUMBIA, ss:

WILLIAM P. MASSING, being duly sworn, says:

1. I am Acting Secretary of Federal Communications Commission and official custodian of the records of said Commission.

2. I make this affidavit for the purpose of controverting the jurisdiction of the Court insofar as this action is brought under the general equity jurisdiction of the Court.

3. On or about October 31, 1941, an attempt was made to serve what purported to be a summons in the above-entitled action on Federal Communications Commission by leaving a copy thereof at the office of the Secretary of said Commission in the New Post Office Building, Washington, D. C., and no service of a summons in said action has been made on said Commission within the State of New York or within the Southern District of New York, or on any of the members thereof within said State or Southern District of New York or elsewhere.

4. Said Commission and the members thereof are not inhabitants of the State of New York or of the Southern District of New York.

(S.) William P. Massing.

Subscribed and sworn to before me this 5th day of November, 1941. (S.) Pansy E. Wiltshire, Notary Public, D. C. My commission Expires October 31, 1945. (Seal.)

[fol. 381a] IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.

[Title omitted]

AFFIDAVIT OF HAROLD C. READ, PROGRAM SERVICE MANAGER
OF THE LONG LINES DEPARTMENT OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss.:

HAROLD C. READ, being duly sworn, deposes and says:

I am Program Service Manager of the Long Lines Department of the American Telephone and Telegraph Company. I am in charge of the division of the Long Lines Commercial Department of the American Telephone and Telegraph Company which furnishes to radio-broadcasting sta-

tions and networks facilities for the transmission of programs between various cities in the United States. My functions relative to the furnishing of program transmission facilities are concerned with the commercial aspects of the service and are as follows: to develop and maintain customer contacts, including negotiations with networks and radio [fol. 381b] stations for program transmission service; to cooperate with other Long Lines departments in determining the availability of facilities suitable for the furnishing of program service of the schedule classification desired; to prepare and furnish to customers quotations as to the charges to be applied for the service desired; to furnish the necessary information to other departments for computing service charges for preparing contracts, contract modifications and billing statements for service furnished; to sign contracts and contract modifications and obtain customers' signatures on contracts. I personally participate in negotiations with networks and radio stations relative to program transmission service.

I am generally familiar with the various aspects of the Telephone Company's business relating to the furnishing to networks and radio stations of circuits for the transmission of radio programs to practically every important city in the United States. The circuits required for program transmission service are of various grades, generally of a higher quality than those required for ordinary speech transmission. Specifically, those required for Schedule "B" (the schedule under consideration in this affidavit) are of high quality and require special equipment of many kinds in addition to special operation and supervision in order to insure the transmission with high fidelity of programs between cities. I am familiar with the terms on which the Telephone Company furnishes to the National Broadcasting Company, the Columbia Broadcasting System, and the Mutual Broadcasting System, the circuits by which they distribute their network programs to their various affiliated stations located throughout the country. I have had experience with technical matters in connection with the furnishing of this service to the three nationwide network organizations.

In connection with the furnishing of program transmission facilities to customers of the Telephone Company, I am required to obtain from other departments of the Long Lines Department information with respect to the avail-

ability of facilities, including those furnished by Associate Companies, for the transmission of programs between various cities of the United States. For the purpose of this affidavit, I have obtained from such other departments of the Long Lines Department the information contained herein with respect to the availability of facilities, including those furnished by Associate Companies, for the program service in question.

I have studied the information contained on the map entitled, "The No. 1 Advertiser Network Possible after August 1—64 Stations." Representatives of the Federal Communications Commission have requested me to state whether or not the Telephone Company has available sufficient program transmission circuits to connect the 64 stations shown on that map and also to state what the charge for the furnishing of such circuits would be. I have been asked to assume that a prospective customer of the Telephone Company desires to broadcast a network program on a nationwide basis. He does not wish to utilize any of the established networks, but he has determined to use the facilities of the 64 stations shown on the map, and he wishes to obtain from the Telephone Company the wire-line facilities necessary for the transmission of his program to those 64 stations. The program the customer has in mind is for one-half hour each Monday evening beginning at 9:00 P. M. Eastern Standard Time, the program to originate in New York City. The customer intends that the program series is to last for one year, but he desires to have an option to cancel the program series at the termination of any 13-week period. Such an arrangement would be satisfactory to the Telephone Company. The customer does not desire permanent lines between the stations but requests program transmission circuits between the 64 stations on a temporary basis for one-half hour per week, the circuits to have a frequency range from approximately 100 to approximately 5,000 cycles per second. Such temporary high quality service is known as Schedule "B" service.

Radio Station WFAA Dallas, Texas and Station KBAF in Fort Worth, Texas are shown on the map in the alternative. I have been informed that those two stations share time and operate on the same frequency. I have been informed further that, pursuant to a time-sharing agreement [fol. 381d] dated July 29, 1940, Station WFAA is authorized to operate Monday evenings from 6:30 to 9:00 P. M.,

Central Standard Time, which is from 7:30 to 10:00 P. M., Eastern Standard Time. Since the one-half hour from 9:00 to 9:30 P. M., Eastern Standard Time, is the period during which the program is to be broadcast, the facts which I shall furnish will relate to Station WFAA.

At the present time the Telephone Company has available for the service desired the facilities for connecting only 54 stations out of the 64 stations requested. These 54 stations are shown in the list below. Of these 54 stations, 40 would be reached over regularly established program facilities which have been provided for program service, and 14 over facilities normally in the telephone layout for toll service, but which may be made suitable and available for the desired program transmission service.

Service to the 10 remaining stations cannot be provided until the completion of new construction without impairment of message toll telephone service because all existing program transmission circuits over these routes are in use and because message toll telephone traffic is now at an unusually high level. All of these stations are on main toll routes on which construction now under way or definitely planned will make the necessary facilities available. Such construction is planned for completion on the various dates indicated below. It should be pointed out, however, that these dates are subject to variation, dependent upon traffic and construction conditions encountered in the future, and there is no assurance that those facilities will be definitely available on the dates indicated.

A. Stations which would be reached over facilities which have been provided for program service:

Portland, Me.	WCSH	Detroit	WJR
Boston	WBZ	Chicago	WMAQ
Providence	WJAR	St. Louis	KMOX
Springfield, Mass.	WBZA	Dallas	WFAA
Hartford	WTIC	Oklahoma City	WKY
Albany (Schenectady)	WGY	Tulsa	KVOO
New York	WJZ	Wichita	KFH
Philadelphia	WFIL	Kansas City	WDAF

[fol. 381e]

Baltimore	WBAL	Omaha	WOW
Washington	WRC	Albuquerque	KOB
Richmond	WRVA	Portland, Ore.	KQW

Charlotte	WBT	Seattle	KOMO
Atlanta	WSB	Spokane	KHQ
Louisville	WAVE	Des Moines	WHO
Cincinnati	WLW	Minneapolis	WCCO
Cleveland	WTAM	Milwaukee	WTMJ
Pittsburgh	KDKA	Denver	KOA
Buffalo	WBEN	Salt Lake City	KSL
Rochester	WHAM	Los Angeles	KFI
Syracuse	WSYR	San Francisco	KPO

Total—40 Stations.

B. Stations which would be reached over circuits normally in the regular telephone message layout but which can be made suitable and available for program service.

Bangor	WLBZ	Birmingham	WBRC
Roanoke	WDBJ	Columbia	WIS
Orlando	WDBO	Charleston	WCSC
Tampa	WFLA	Jacksonville	WJAX
Miami	WQAM	Houston	KPRC
Chattanooga	WDOD	San Antonio	WOAI
Knoxville	WROL	Duluth	WEBC

Total—14 Stations.

C. Stations which could be connected to the proposed program network upon completion of construction now under way or definitely planned:

Date Facilities are Expected
to be Available

Raleigh	WPTF	4-1-42
Nashville	WSM	7-1-42
Memphis	WMC	5-1-42
Little Rock	KARK	5-1-42
Jackson, Miss.	WJDX	5-1-42
New Orleans	WWL	3-1-42
Shreveport	KWKH	4-1-42
Fargo	WDAY	7-1-42
Bismarck	KFYR	7-1-42
Phoenix	KTAR	5-1-42

Total—10 Stations.

Charges for Program Transmission Service

Exhibit No. 1 and Exhibit No. 2 attached hereto have been prepared in order to illustrate the method utilized by

the Telephone Company in accordance with its Tariff F. C. C. No. 198 in determining the pricing mileage on which the interexchange channel charges for the proposed service are based. The exhibits show the shortest airline mileages between the various stations on the advertiser network. The exhibits represent simply pricing layouts and the lines do not represent the routes of the actual program transmission circuits. The charges for these circuits are computed not on the basis of the actual length of the circuits but on the basis of the shortest airline mileage connecting the service and junction points. The cities on Exhibit 1, which are not connected to the network by lines are those which could be connected to the program network only upon the completion of additional construction.

It is assumed that existing local loops already furnished each station connecting each station with the telephone exchange in its city will be utilized and that, therefore, the charges for local loops will be paid by each station and will not be billed to the customer who is requesting the program transmission service.

The total charges applicable at present rates, as filed in Tariff F. C. C. No. 198 of the American Telephone and Telegraph Company, Long Lines Department, for the network comprising the 54 stations to which the Telephone Company could supply program transmission circuits at the present time, are as follows:

a. Mileage Charges

Total pricing mileage (layout shown on Exhibit 1) 8,783 airline miles.

Schedule "B" rate per mile per hour or fraction thereof \$.20.

Total mileage charges— $8,783 \times \$0.20$ or \$1,756.60 for one-half hour.

This mileage charge would be the same for each weekly half-hour of use.

b. Switching Charges

Associated with the first program there would be a switching charge of \$.50 per station for disconnecting the local loop at each station at the conclusion of the program.

$54 \text{ stations} \times \$0.50 = \$27$ switching charge for first program.

Associated with each succeeding program (except the last one) there would be a switching charge of \$1 per station—\$.50 for connecting the local loop at the start of the program and \$.50 for disconnecting the local loop at the conclusion of the program.

54 stations x \$1 = \$54 switching charge for each intermediate program.

[fol. 381g] Associated with the last program there would be a switching charge of \$.50 per station for connecting the local loop at the start of the program. No switching charge would apply for the final disconnection.

54 stations x \$.50 = \$27 switching charge for last program.

In addition to the above switching charges there will be other charges if rearrangements of existing services are necessary to make the assumed existing local loops available for this service.

c. Other Charges

For each station connected, station connection charges would apply as follows:

(1) A charge of \$30 per month for each station, applied on a monthly basis only.

54 stations x \$30 = \$1,620 per month.

(2) A charge of \$2.50 per station for each hour or fraction thereof of use.

54 stations x \$2.50 = \$135 per one-half hour program.

On the above basis the total charges applicable would be as follows:

A. One program (one-half hour duration)

Loops (assumed to be existing)	No charge
Mileage (8,783 x \$.20)	\$1,756.60
Switching (54 x \$.50)	27.00
Station connection—Monthly basis (54 x \$30)	1,620.00
Hourly basis (54 x \$2.50)	135.00
Total	<hr/> \$3,538.60

B. One Year (52 Programs, one-half hour duration)

Loops (assumed to be existing)	No charge
Mileage (8,783 x \$.20 x 52)	\$91,343.20
Switching	
1st Program (54 x \$.50)	\$27.00
Intermediate Programs (54 x \$1.50)	2,700.00
Last Program (54 x \$.50)	27.00
	<hr/>
	2,754.00
Station connection—Monthly basis (54 x \$.30 x 12)	19,440.00
—Hourly basis (54 x \$2.50 x 52)	
Station connection—Hourly basis (54 x \$2.50 x 52)	7,020.00
	<hr/>
Total charge for one year	\$120,557.20

One year to have 52 weekly programs would consist of twelve months—four months containing five programs each and eight months containing four programs each. Charges for the circuits for a 54-station network for a month containing five programs and for a month containing four programs would be as follows:

[fol. 381h]	Five Program Month	Four Program Month
Loops (assumed to be existing)	No charge	No charge
Mileage (8,783 x \$.20 x 5)	\$8,783.00	
(8,783 x \$.20 x 4)		\$7,026.40
*Switching (54 x \$1 x 5)	270.00	
(54 x \$1 x 4)		216.00
Connection (54 x \$.30)	1,620.00	1,620.00
Operation (54 x \$2.50 x 5)	675.00	
(54 x \$2.50 x 4)		540.00
	<hr/>	<hr/>
	\$11,348.00	\$9,402.40

* Switching charge will be reduced by \$27 for first month and \$27 for last month since no charge is applied for connecting the local loop to the connection for the first program and no charge is applied for disconnecting the local loop from the connection on the last program.

Charges for Circuits for 64-Station Network

After the circuits for a complete 64-station network could be provided by the Telephone Company, the total charges applicable at present rates as filed in Tariff F. C. C. No.

198 of the American Telephone and Telegraph Company, Long Lines Department, would be as follows:

a. Mileage Charges

Total pricing mileage (layout shown on exhibit 2)—10,277 airline miles.

Schedule "B" rate per mile per hour—\$.20.

Total mileage charges per hour—10,277 x \$.20 or \$2,055.40 for 1/2 hour.

This mileage charge would be the same for each weekly half hour of use.

b. Switching Charges

Associated with the first program there would be a switching charge of \$.50 per station for disconnecting the local loop at each station at the conclusion of the program.

64 stations x \$.50 = \$32 switching charge for first program.

Associated with each succeeding program (except the last one) there would be a switching charge of \$1 per station —\$.50 for connecting the local loop at the start of the program, and \$.50 for disconnecting the local loop at the conclusion of the program.

64 stations x \$1 = \$64 switching charge for each intermediate program.

[fol. 381i] Associated with the last program there would be a switching charge of \$.50 per station for connecting the local loop at the start of the program. No switching charge would apply for the final disconnection.

64 stations x \$.50 = \$32 switching charge for last program.

In addition to the above switching charges there will be other charges if rearrangements of existing services are necessary to make the assumed existing local loops available for this service.

c. Other Charges

For each station connected, station connection charges would apply as follows:

(1) A charge of \$30 per month for each station, applied on a monthly basis only.

64 stations x \$30 = \$1,920 per month.

(2) A charge of \$2.50 per station for each hour or fraction thereof of use.

64 stations x \$2.50 = \$160 per program.

On the above basis the total charges applicable would be as follows:

A. One Program (one-half hour duration)

Loops (assumed to be existing)	No charge
Mileage (10,277 x \$.20)	\$2,055.40
Switching (64 x \$.50)	32.00
Station Connection—Monthly basis (64 x \$30)	1,920.00
Hourly basis (64 x \$2.50)	160.00
	<hr/>
	\$4,167.40

B. One Year (52 programs, one-half hour duration)

Loops (assumed to be existing)	No charge
Mileage (10,277 x \$.20 x 52)	\$106,880.80
Switching	
1st Program (64 x \$.50)	32.00
Intermediate Programs (64 x \$1 x 50)	\$3,200.00
Last Program (64 x \$.50)	32.00
	<hr/>
	3,264.00
Station Connection—Monthly basis (64 x \$20 x 12)	23,040.00
Hourly basis (64 x \$2.50 x 52)	
Station connection—Hourly basis (64 x \$2.50 x 52)	8,320.00
	<hr/>
Total Charge for one year	\$141,504.80

One year covering 52 weekly programs would consist of twelve months—four months containing five programs each and eight months containing four programs each. Charges for a month containing five programs, and for a month containing four programs, would be as follows:

[fol. 381j]	Five Program Month	Four Program Month
Loops (assumed to be existing)	No charge	No charge
Mileage (10,277 x \$.20 x 5)	\$10,277.00	
(10,277 x \$.20 x 4)		\$8,221.60

*Switching (64 x \$1 x 5)	320.00	.....
(64 x \$1 x 4)		256.00
Connection (64 x \$30)	1,920.00	1,920.00
Operation (64 x \$2.50 x 5)	800.00	.....
(64 x \$2.50 x 4)		640.00
	<hr/>	<hr/>
	\$13,317.00	\$11,037.00

* Switching charge will be reduced by \$32 for first month and \$32 for last month since no charge is applied for connecting the local loop to the connection for the first program and no charge is applied for disconnecting the local loop from the connection on the last program.

Costs Involved in Changing Origination Point of Program

In connection with changing the origination point of the program, two situations must be distinguished:

(a) Originating the program in its entirety at Los Angeles rather than New York; and,

(b) Providing for the origination of the programs either at New York or at Los Angeles, or part in one city and part in the other, as the individual broadcasts require.

In the case of (a) above, assuming that the weekly program originates in its entirety at Los Angeles rather than New York, the same conditions would apply as in the case of the program originating in its entirety at New York. The same charges would be applicable as in the case of both the 54-station and the 64-station networks set forth above.

In the case of (b) above, using the facilities included in the above charges for both the 54- and 64-station networks, it would not be possible during an individual broadcast to originate part of the program at Los Angeles and part in New York. However, if the customer desired such an arrangement, this could be done by providing an additional circuit from Los Angeles to New York, which is at present available and over which the Los Angeles portion of the program would be sent to New York and transmitted over the network from that point. Such additional circuit for either the 54- or the 64-station network would cost \$553.60 for the first weekly program within any given month, this charge being made up as follows:

[fol. 381k]

Local loops (assumed to be existing)	No charge
Mileage Charge (2,438 mi x \$.20)	\$487.60
Station Connection Charges—Monthly Basis (\$30 x 2)	60.00
Station Connection Charges—Hourly Basis (\$2.50 x 2)	5.00
Switching Charge (2 at \$.50)	1.00
Total	\$553.60

For succeeding programs within the same month, the charge would be \$494.60 made up as follows:

Local Loops (assumed to be existing)	No charge
Mileage Charge (2,438 mi. x \$.20)	\$487.60
Station Connection Charges—Hourly Basis (\$2.50 x 2)	5.00
Switching Charges (4 at \$.50)	2.00
Total	\$494.60

The above statements regarding the availability of circuits are based upon a request for one such network and predicated upon present conditions.

(Signed) Harold C. Read, Program Service Manager.

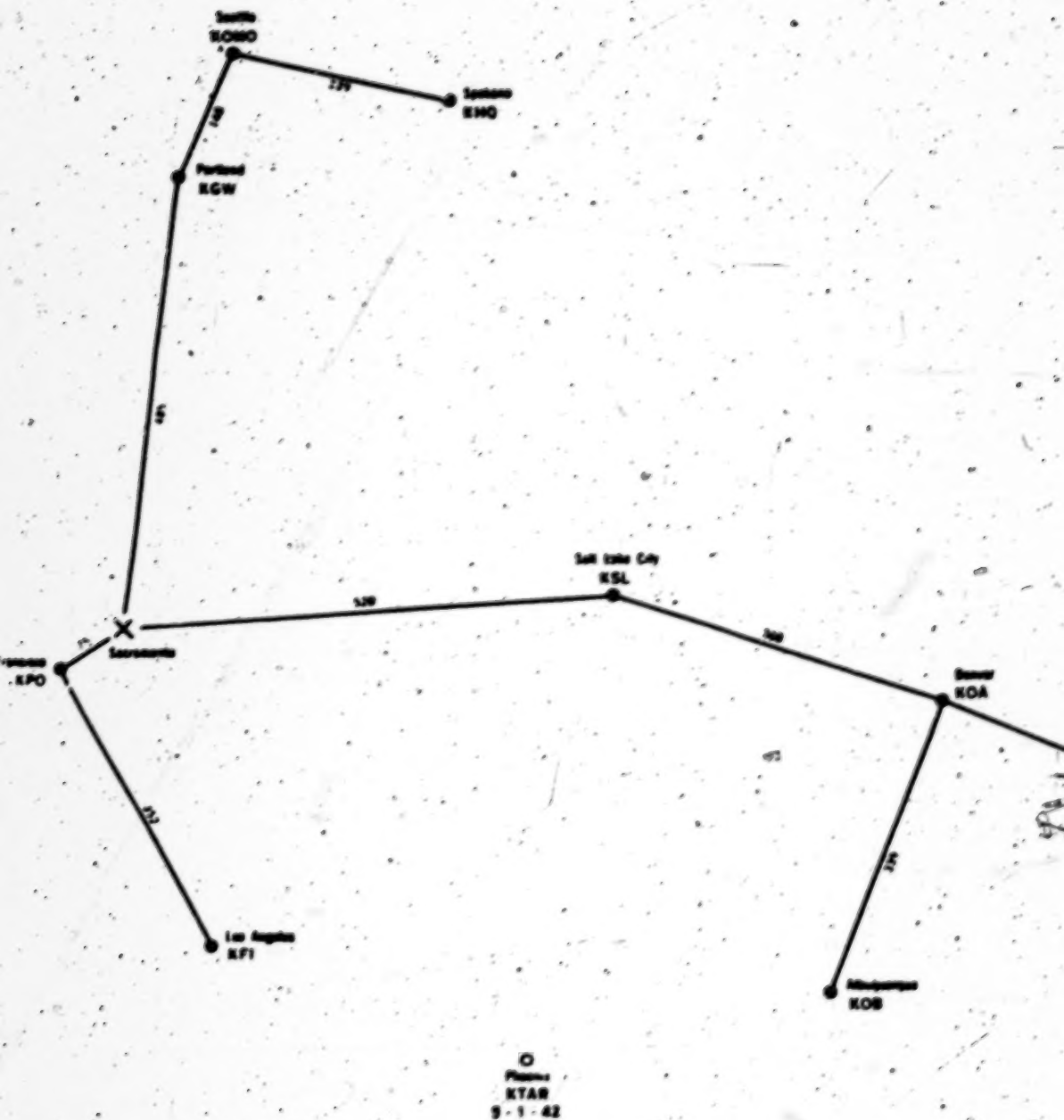
Subscribed and sworn to Before Me This 25th Day of November, 1941. (Signed) William John Keener, Notary Public, Nassau County No. 833 (Seal.)

Cert. filed in N. Y. County.

N. Y. Co. Clk's No. 130, Reg. No. 2K-112.

Commission expires March 30, 1942.

(Here follow 2 photolithographs, Exhibits 1 and 2, side folios 381l-381m.)

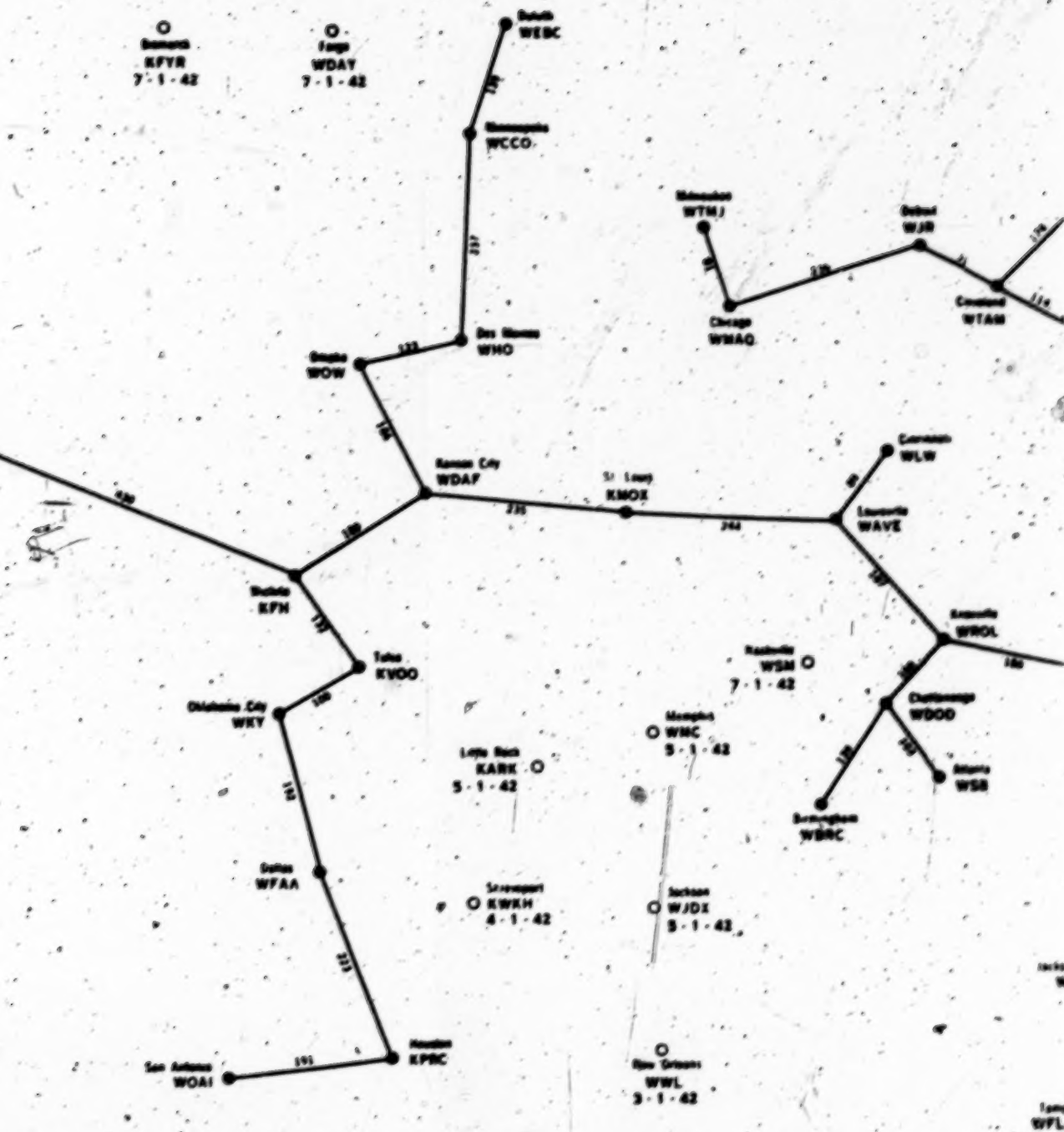


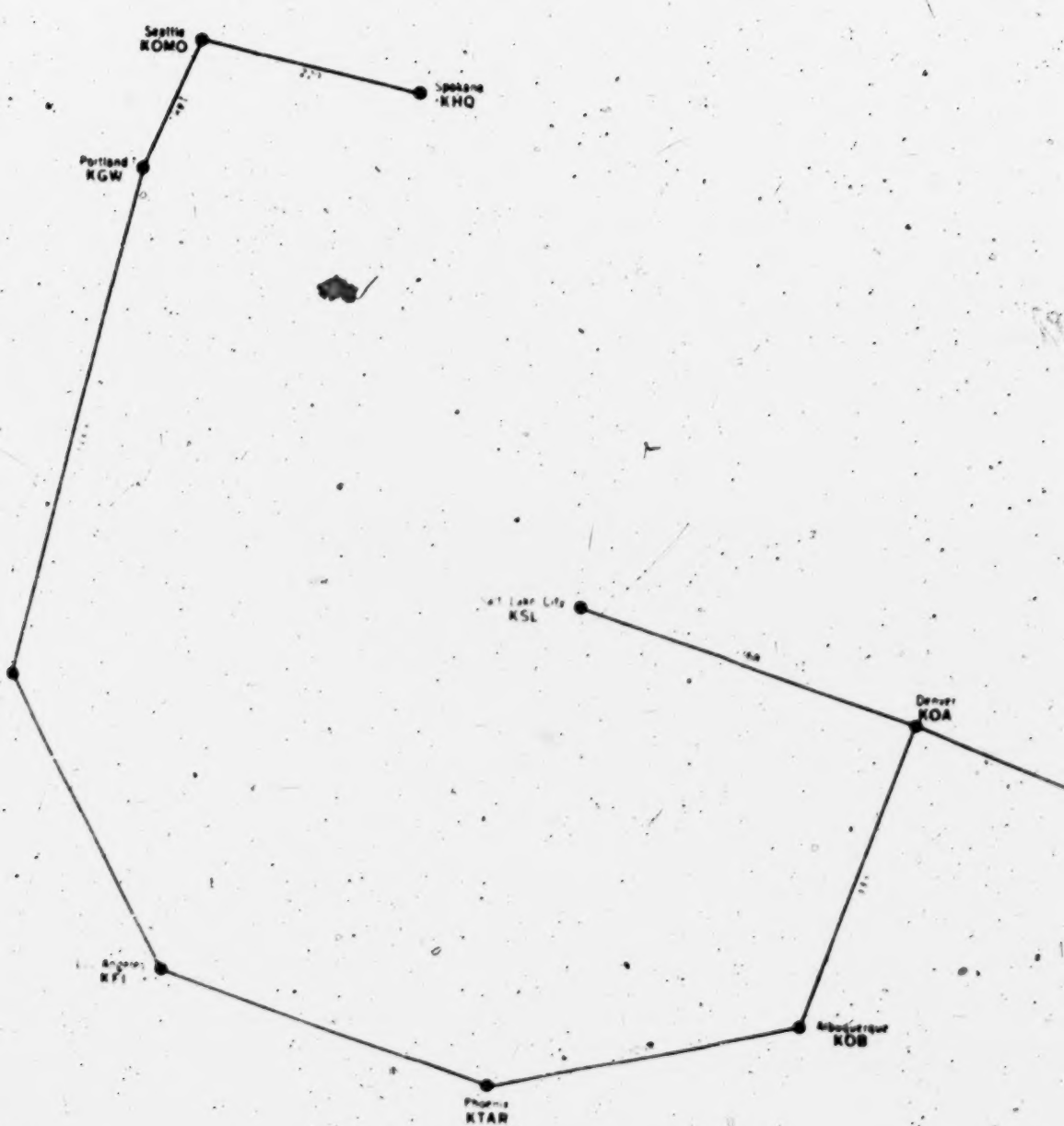
X Junction Points

● Service Points

○ Service Points Available by Construction on Date Indicated

Pricing Mileage - 8783 Air-Line Miles

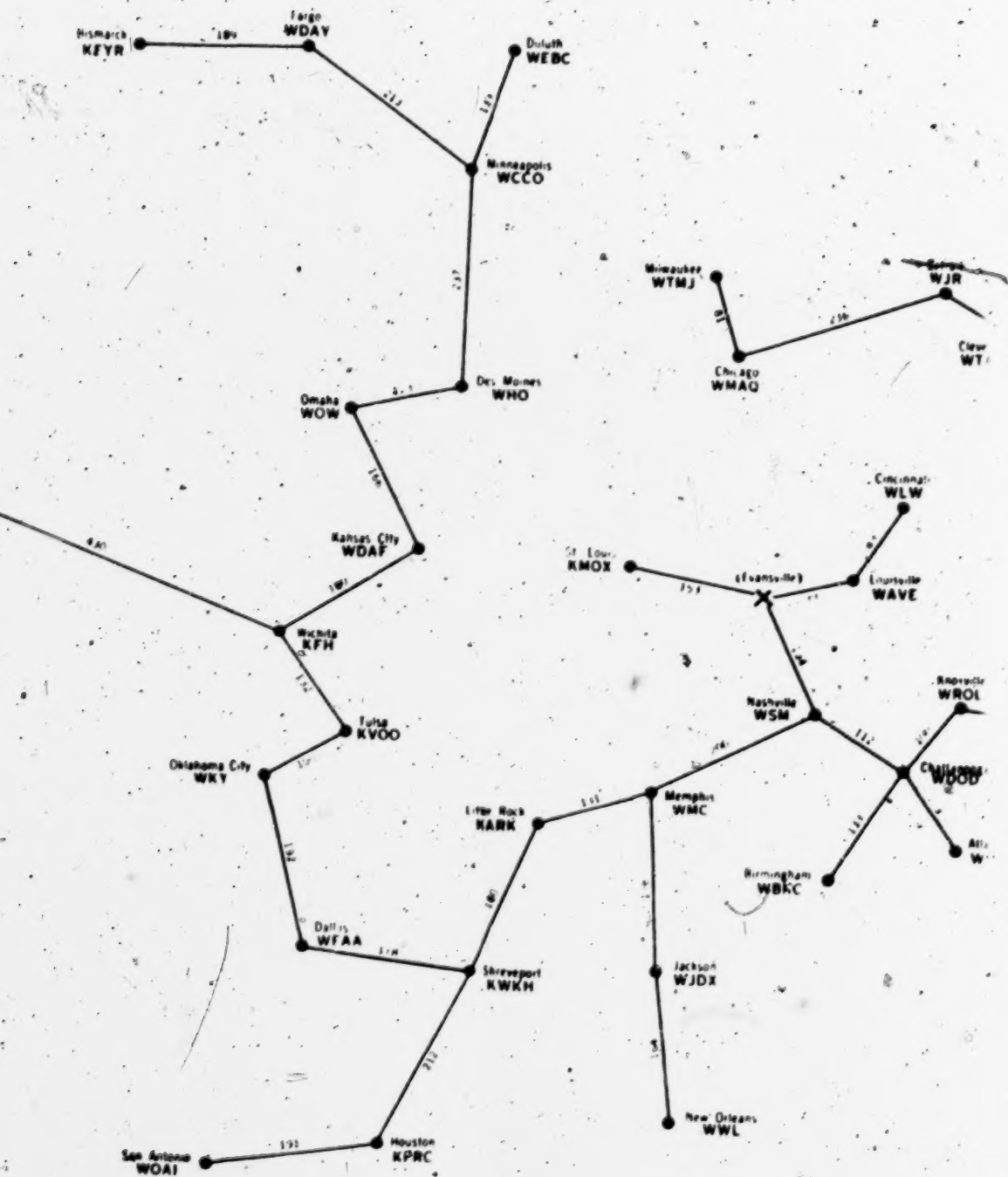


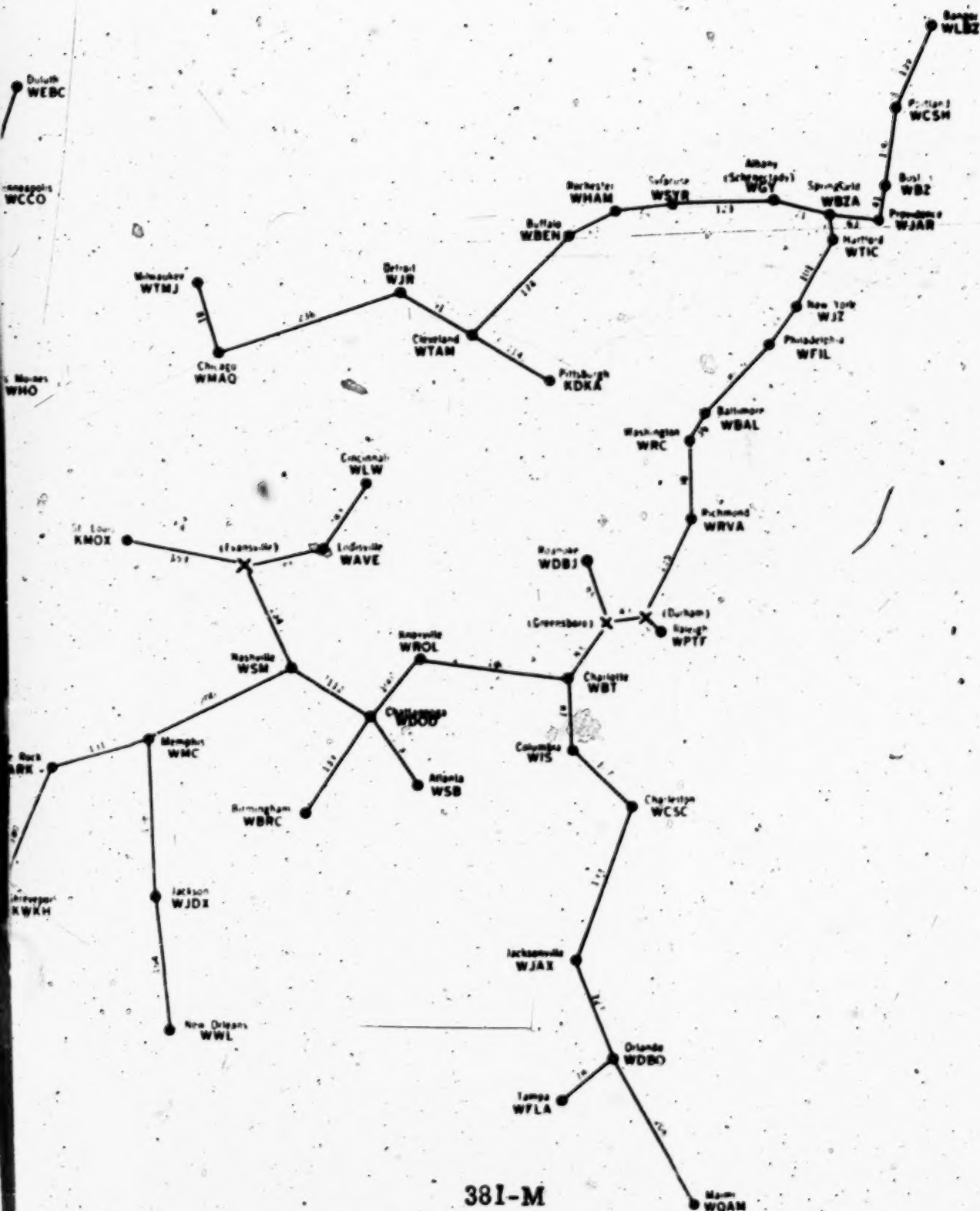


X Junction Points

• Service Points

Pricing Mileage 10277 Air Line Miles





[fol. 382] **Plaintiffs' Affidavits in Opposition to Motions to
Dismiss Complaint or for Summary Judgment**

**IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIS-
TRICT OF NEW YORK**

**AFFIDAVIT OF SIDNEY N. STROTZ, NBC Vice President in
Charge of Programs**

**UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:**

SIDNEY N. STROTZ, being duly sworn, deposes and says:

1. I am employed by National Broadcasting Company, Inc. (hereinafter called "NBC"), one of the plaintiffs in this action, as Vice President in Charge of Programs. In 1933 I was first employed by NBC as Manager of the Program and Artists Service Departments of its Central Division with headquarters in Chicago. In January, 1939, I was appointed Manager of the NBC Central Division and in December, 1939, I became a Vice President of NBC in charge of that Division. I have been in charge of NBC's programs since October 8, 1940.

2. In the course of my employment with NBC since 1933, I have become thoroughly familiar with the programs broadcast by NBC, including those originated and developed by NBC itself and those broadcast by NBC for others.

3. In the preparation of this affidavit, my recollection has been refreshed by compilations of data with respect to the programs broadcast by NBC taken from the NBC records and prepared by the NBC statistical staff.

NBC News Services

4. The greatest achievement of network broadcasting is its service as a means of mass communication on a nationwide and instantaneous basis. This is a notable contribution in time of peace and an imperative necessity in time of war. NBC recognizes, especially in these times of world crisis, that no other phase of its service to the public is more important, that news impartially presented is fundamental and basic to our democratic system.

[fol. 383] 5. News reports as we know them today did not exist on NBC networks at the time of its organization in 1926. The need was soon recognized and by 1932 an average of five hours weekly was devoted to news reports and news summaries. The following table indicates the increasing importance which NBC has placed on this portion of its broadcasting service.

Year	Number of News Program Hours	News as Percent of Total Program Hours
1926		
1932	254	2.0
1936	705	3.6
1940	1436	8.0
1941 (estimate)	1703	8.8

6. Eloquent testimony of the importance placed on news broadcasts comes daily by letters from families in remote areas and isolated places. There are vast stretches of this country containing millions in population entirely dependent on the radio news services for their information as to current events. In times such as these, the radio newscaster is listened to regularly and faithfully. In the great, rural districts thousands of farm families have as practically their only contact with the outside world for months at a time the news messages coming through the loud speaker. The whole world is brought to their door via live broadcasts from the furthestmost cities of the globe. The craving for news of what is happening in this country and throughout the world is found among all types of people, regardless of economic status, age, education, or political inclination, and they depend on radio as a principal source of news.

7. In its dissemination of news NBC makes use of the services of established news-gathering agencies which are equally available to the press, including AP, UP and INS. These news summaries are scheduled at frequent intervals throughout the day and evening (schedule attached hereto as Exhibit "A") and, almost without exception, presented just as they came from the news tickers without change or addition.

8. Numerous commentators are heard on NBC networks usually with expanded resumés and interpretations of lat-

[fol. 384] est developments. To keep the nation informed as to what is going on in other parts of the world NBC maintains an extensive staff of overseas reporters whose daily accounts are shortwaved and rebroadcast for U. S. listeners.

Up to the participation of the United States in the war, NBC maintained its own correspondents in each of the following 26 foreign cities:

Brazzaville, Fr. French Africa	Reykjavik, Iceland
Juneau, Alaska	Rome, Italy
Buenos Aires, Argentina	Tokio, Japan
Sydney, Australia	Manila, P. I.
Batavia, Java	Mexico City, Mexico
Shanghai, China	Panama City, Panama
Chungking, China	San Juan, Porto Rico
Bogota, Columbia	Kouibyshev, Russia
Cairs, Egypt	Singapore
London, England	Stockholm, Sweden
Helsinki, Finland	Berne, Switzerland
Vichy, France	Ankara, Turkey
Berlin, Germany	Caracas, Venezuela

Since the outbreak of war, of course, NBC's correspondents in enemy countries have not been permitted to broadcast or transmit news.

9. Supplementing these regular news sources NBC has established its own listening post where a twenty-four hour daily vigil is kept by a corps of specially trained linguists whose duty it is to listen to foreign short wave broadcasts. Their reports are flashed to NBC's News Room and made available to press associations throughout the country.

10. The broadcast accounts of events as they are actually happening is a form of news reporting unique to network radio. NBC has brought on-the-scene word pictures wherever world news events were taking place and as history was being made. When Japan abruptly terminated her negotiations with our government by a devastating bombing raid on our Pacific Base at Pearl Harbor, December 7, 1941, the news was flashed by radio to the NBC listening audience within thirty minutes. Throughout the day and night, programs were interrupted with reports of latest

[fol. 385] developments and interpretations of what was happening. One the following day the momentous message of President Roosevelt informed the world by radio of our country's declaration of war against Japan. The broadcasts in connection with the opening of hostilities with Japan exemplify the type of public service NBC stands prepared to render twenty-four hours a day. Exhibit B annexed hereto contains examples of outstanding news events of the type broadcast by NBC.

NBC Public Discussion Programs

11. The fact that radio in this country is self supporting through the sale of time to advertisers means, among other things, that NBC can thereby provide the opportunity for the free expression of opinion on questions of national interest. This distinguishes the American system from that of most other nations. Regardless of the administration in office, the company has always made its facilities available to the government for the expression of its views and has given similar opportunities to the opposition to voice its opinions in order that a fair presentation of public questions can be made.

12. Officials of our government, the President, Cabinet officers, members of Congress, State representatives, leaders of the educational, social, and religious forces, all are afforded the facilities of NBC's nationwide organization to express their views and keep the public informed. Increasing use of network broadcasting has been made by the President, the familiar fireside chats making it possible for the Chief Executive to talk directly into the homes of the nation. Representatives of all governmental departments and agencies have been granted NBC time to discuss at first hand the developments within their own fields of responsibility. The following list is indicative of the use of time on NBC in 1941 by officials of the Federal government:

	Number of Radio Speeches
President Roosevelt	21
Vice President and Cabinet Members	106
Congressmen	215

13. In the direction of its efforts toward the enlightenment of the public on all important governmental, political,

[fol. 386] and economic questions, NBC has provided for the open discussion of all sides of controversial issues. As long ago as 1932 the National Radio Forum was established by NBC in cooperation with the Washington Evening Star. The "University of Chicago Round Table Discussions" have been a feature broadcast on NBC since 1933 presenting in an informal, unrehearsed manner, opposing views of questions of the day. During its six years on NBC "America's Town Meeting of the Air" has become one of the most unique and outstanding forum programs on the air. It is NBC's policy and its earnest endeavor to grant equal facilities to groups and individuals in the presentation of conflicting opinions on such controversial issues as the Supreme Court case, the Lease-Lend Bill, the Neutrality Act, etc. Attached as Exhibit "C" is a list of the forum and discussion programs on NBC networks in 1941.

14. During 1940 NBC has made available 1,220 program hours or 9.6% of all its sustaining program time for broadcasts in behalf of various organized groups representing business, charity, education, government, labor, etc. This imposing list (copy of which is attached) indicates that three hundred and fifty two separate organizations were provided time as follows:

Organization	Number of Organizations	Total Program Time
		Hours Mins.
Business	44	53:29
Charity, etc.	23	32:21
Civic	30	47:38
Cultural	46	201:02
Educational	70	144:12
Farm	3	248:40
Governmental	24	97:13
Labor	11	8:21
Patriotic	17	16:47
Political	44	131:54
Religious	23	204:20
Scientific	17	34:10
Total	352	1220:07

These organizations are identified in Exhibit "D", attached hereto.

[fol. 387] 15. NBC's concept of its responsibility in the field of public service extends to a wide variety of program types; in terms of program time these broadcasts account for 35% of the total program day. In addition to news and special events broadcasts, talks, forum discussions, etc., the field of NBC activity includes presentation of the world's finest music and drama, the cooperation with the Government Parent Teacher and Women's organizations in the presentation of programs of special interest to women and children. Opportunity is granted the three major religious faiths for programs on a regular weekly schedule. Six days each week the NBC in cooperation with the Department of Agriculture presents the National Farm and Home Hour, a program dedicated to the service of American agriculture, now in its thirteenth consecutive year. A list of outstanding NBC public service programs is attached hereto as Exhibit E.

16. NBC is proud of its record of fifteen years of public service. In the crisis of the war which is upon us, NBC stands ready to devote its facilities to whatever use will best serve the interests of national defense and our ultimate victory. NBC hopes to continue to operate on the high plane of public responsibility which it has always maintained toward the government and the people.

Sidney N. Strotz.

Subscribed and sworn to before me this 3rd day of January, 1942. Florence E. Marger, Notary Public. (Seal.)

Queens Co. No. 2625, Reg. No. 6868.

Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369.

Commission Expires March 30, 1943.

[fol. 388]

EXHIBIT "A" TO AFFIDAVIT

Regularly Scheduled News Broadcasts on NBC-Red & Blue Networks as of December 5, 1941

Red Network

Time (Est)	Program	Schedule
8:00-8:05 AM	News Summary	Sunday
8:00-8:15 AM	European News Roundup	Mon thru Sat
8:00-8:15 AM	Clifton M. Utley (Skelly Oil Co.)	Mon thru Fri
8:45-9:00 AM	News Summary	Mon thru Sat
9:00-9:15 AM	European News Roundup	Sunday
11:00-11:05 AM	News Summary	Sunday
1:00-1:15 PM	Upton Close	Sunday
1:45-1:50 PM	News Summary	Mon thru Fri
3:15-3:30 PM	H. V. Kaltenborn	Sunday
6:25-6:30 PM	News Summary	Mon thru Sat
7:15-7:30 PM	News of the World (Miles Labs.)	Mon thru Fri
7:45-8:00 PM	Kaltenborn Edits the News (Pure Oil)	Tues-Thurs-Sat
11:00-11:15 PM	News Summary	Daily
11:15-11:30 PM	Story Behind the Headlines	Sunday
12:00-12:05 AM	News Summary	Daily
12:55-1:00 AM	News Summary	Daily

[fol. 431]

Blue Network

Time (Est)	Program	Schedule
8:00-8:05 AM	News Summary	Sunday
8:00-8:15 AM	European News Roundup	Mon thru Sat
8:55-9:00 AM	News Summary	Mon thru Sat
9:00-9:15 AM	European News Roundup	Sunday
10:15-10:30 AM	Helen Hiatt	Mon thru Fri
11:00-11:05 AM	News Summary	Sunday
1:45-1:50 PM	News Summary	Mon thru Fri
4:45-5:00 PM	News Summary	Mon thru Fri
6:30-6:45 PM	Pearson and Allen (Health aids Inc.)	Sunday
6:45-7:00 PM	Over Our Coffee Cups (Pan American Coffee Bureau)	Sunday
6:45-7:00 PM	Lowell Thomas (Sun Oil Company)	Mon thru Fri
7:00-7:30 PM	European News Roundup	Sunday
7:45-8:00 PM	Upton Close	Wednesday
7:45-8:00 PM	Edward Tomlinson	Saturday
8:00-8:15 PM	Edward Tomlinson	Friday
8:00-8:30 PM	March of Time (Time Inc.)	Thursday
9:00-9:15 PM	Walter Winchell (Jergens Company)	Sunday
9:00-9:15 PM	News Here and Abroad (Trimount Clothing Co.)	Thursday
9:55-10:00 PM	Smith-Brothers News (Smith Brothers)	Friday
10:30-10:45 PM	Ahead of the Headlines (Weekly Publications)	Wednesday
10:30-10:45 PM	News Here and Abroad	Mon-Thurs-Fri
11:00-11:05 PM	News Summary	Sunday
12:00-12:05 AM	News Summary	Daily
12:55-1:00 AM	News Summary	Daily
1:00-1:05 AM	Baukhage (National Farm and Home Hour)	Mon thru Fri

[fol. 389]

EXHIBIT "B" TO AFFIDAVIT

Examples of Outstanding News Events Broadcast by NBC Networks

- 1927 (August 7) Dedication of the International Peace Bridge at Niagara Falls to the continuation of peaceful international relations.
- 1928 (June 12-15) Complete coverage of Republican National Convention in Kansas City.
- 1928 (June 26-29) Complete coverage of Democratic National Convention in Houston Texas.
- 1928 (December 10) Opening of International Conference of American States in Pan American Building.
- 1929 (March 4) Inauguration Ceremonies of President Hoover and Vice President Curtis. For the first time in history, microphones were placed in the Senate Chambers where the Vice President was inaugurated.
- 1930 (January 21) Opening session of the London Naval Parley; Speakers—King George V, Ramsey McDonald, Secretary Stimson, Henri Tardieu, Dino Grandi.
- 1930 (October 30) London England—The Prince of Wales address before the League of Nations dinner to delegates at the British Imperial Conference.
- 1931 (September) Geneva, Switzerland—Complete coverage of the Geneva Peace Conference.
- 1931 (June and July) Pick-ups from around the world covering the flight of Post and Gatty.
- 1932 (January 20) Mukden Manchuria—General Shigeru Honjo, leader of Japanese Military Forces, and Floyd Gibbons broadcasting from the battlefields of Manchuria.
- 1932 (January 31-March 13) Geneva Switzerland—World Disarmament Conference—Official opening address and forty talks by William Hard.
- 1932 (June 27-July 2) Complete coverage of Democratic National Convention held in Chicago, Illinois.
- 1932 (June 14-June 16) Complete coverage of the Republican National Convention held in Chicago, Illinois.
- 1932 (October 15) Rome Italy—Address by Guglielmo Marconi, Marking the Tenth Anniversary of Fascism.
- 1933 (May 15) Berlin Germany—Address of Chancellor Adolph Hitler delivered before the German Reichstag announcing Germany's foreign policy under the Nazi regime.
- 1933 (June 12) London England—Opening of the World Economic and Monetary Conference.
- 1933 (March 12) First Fireside talk by President Roosevelt.
- 1934 (January 3) Ceremonies of the opening of the second session of the 73rd Congress.
- 1934 (May 31) Complete description of President Roosevelt's review of the United States Battle Fleet.
- 1935 (September 13) Talk by Haile Selassie from Addis Ababa in connection with the Ethiopian-Italian War.

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EXHIBIT "B" TO AFFIDAVIT—Continued

- 1935 (August 20-28) Most extensive field broadcast hookup in radio history of the Army Maneuvers at Pine Camp, New York.
- 1936 (Nov. 6-Dec. 23) Pan American Peace Conference held in South America and attended by various dignitaries including President Roosevelt.
- 1936 (June 9-12) Complete coverage of the Republican National Convention held in Cleveland.
- 1936 (June 23-27) Complete coverage of the Democratic National Convention held in Philadelphia.
- 1937 (September 11) Broadcast by Madame Chiang Kai-Shek on the war situation in China.
- 1937 (May 12) Coronation of King George VI and Queen Elizabeth of England.
- 1938 (March 12) Complete coverage of the absorption of Austria by Germany including such broadcasts as Hitler's first entrance into Austria at Linz.
- 1938 (September 16) Description of the arrival of Prime Minister Chamberlain in London after his first meeting with Hitler.
- 1938 (September 29) From Munich, Germany, first official reading of the Four Power Pact.
- 1939 (February 9) Tolling of Chimes and description followed by the announcement of the passing of Pope Pius XI.
- 1939 (March 2) From Vatican City—announcement of Election of Pope Pius XII.
- 1939 (September 23-27) Broadcasts in connection with the Pan American Peace Conference held in Panama City.
- 1939 (March 23) From Memel, arrival of Hitler—description of scene followed by talk of Herr Hitler.
- 1939 (August 31) Berlin Germany—Spokesman for German Press gave the sixteen points in Hitler's proposal for settlement of Danzig and Polish corridor (first word of Hitler's official demands upon Poland).
- 1939 (September 3) London, England—Prime Minister Chamberlain from Ten Downing Street declared England at war with Germany. Paris, France—Premier Deladier declaration of war.
- 1939 (December 17) Montevideo, Uruguay—First actual description of a scuttling of a ship in war time. The German war ship Graf Spee was scuttled and sunk.
- 1940 (June 10) Rome, Italy—Premier Mussolini declared war on the Allies.
- 1940 (June 21-22) Compiègne Forest, France—description of Armistice proceedings between Germany and France.
- 1941 (January 20) Complete description of the Third Inauguration of Franklin D. Roosevelt as President of the United States.
- 1941 (August 14) London, England—Major Clement J. Atlee read the joint declaration—eight point resolution established by the Roosevelt-Churchill Atlantic meeting.
- 1941 (December 8) President Roosevelt's joint message to Congress asking for a declaration of war on Japan.

Forum and Discussion Programs on NBC Networks in 1941

Program	Network	Time
National Radio Forum (since June 1933)..... Discussions of vital problems facing the American people by representatives of our government and authoritative speakers.	Blue	Monday 9:00-9:30 PM
America's Town Meeting of the Air (since May 1935). Forum broadcast direct from the floor of Town Hall, New York, presenting leaders in various fields of thought in American political and economic life in discussions of current problems under the auspices of Town Hall, Inc.	Blue	Thursday 9:15-10:15 PM
University of Chicago Round Table (since Oct. 1933). Non-partisan discussions of current topics of political, economic, social and international interest by members of the University of Chicago faculty, produced in cooperation with the University Broadcasting Council.	Red	Sunday 2:30-3:00 PM
Foreign Policy Association (1929-1933) (since Oct. 1939)..... Authoritative speakers on our international relations.	Blue	Sunday 12:00-12:15 PM
Wake Up America (since Sept. 1941)..... Forum program produced in cooperation with the American Economic Foundation and presenting two outstanding speakers discussing important economic issues.	Blue	Sunday 2:00-3:00 PM
Republican Club Saturday Discussions (since Jan. 1938)..... Discussions on current economic, social and international problems facing America by leading Republican figures.	Red	Saturday 1:30-2:00 PM
American Education Forum (Oct. 1935-April 1941).. Discussion of controversial issues in education by leading professors and arranged by the American Education Committee.	Blue	Saturday 12:00-12:25 PM

NBC Network Program Time in Behalf of Various Organizations
Year 1940

During the year 1940 NBC supplied 12,405 hours of sustaining program service to the Red, Blue, Pacific Red and Pacific Blue networks. Of this amount, this report reveals that 1,220 hours or 9.8 percent of the sustaining total were broadcast in behalf of business, charitable, civic, educational, farm, government, labor, patriotic, political, religious and scientific organizations.

Organisation	Number of Organisations	Total Time Hrs.:Min.	% of Total Organisation Time
Business.....	44	53:39	4.4
Charity, etc.	23	32:21	2.6
Civic.....	30	47:38	3.9
Cultural.....	46	201:02	16.5
Educational.....	70	144:12	11.8
Farm.....	3	248:40	20.4
Governmental.....	24	97:13	8.0
Labor.....	11	8:21	.7
Patriotic.....	17	16:47	1.4
Political.....	44	131:54	10.8
Religious.....	23	304:20	24.8
Scientific.....	17	34:10	2.8

Total.....
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Sept. 23, 1941

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Alphabetical List of Organizations Using NBC Networks 1940

Organization	Classification	Total Time Hr. Min.
Academy of Political Science	Educational	1 00
Advanced School of Education (see Columbia University)		
Advertising Club of New York	Business	1 26
Advertising Women of New York	Business	30
Agricultural Marketing Service (see Dept. of Agriculture)		
Ar Youth of America	Educational	1 45
Assimilated Clothing Workers (see Congress of Industrial Organizations)		
American First Committee	Political	15
American Academy of Ophthalmology & Otolaryngology	Scientific	15
American Association for Adult Education Inc.	Educational	18 30
American Association for the Advancement of Science	Scientific	2 30
American Association for Health, Physical Education & Recreation (see Natl. Education Association of U. S.)		
American Association of Museums	Cultural	4 00
American Association of School Administrators	Educational	42
American Bar Association	Business	14
American Civil Liberties Union	Political	45
American Coalition of Patriotic Societies	Patriotic	27
American College Publicity Association	Educational	30
American College of Surgeons	Scientific	12
American Council on Education	Civic	1 30
American Defense Society	Political	30
American Design Award (see Lord & Taylor)		
American Dental Association	Scientific	40
American Education Committee	Educational	12 05
American Farm Bureau Federation	Farm	30
American Federation of Labor	Labor	4 15
American Good Government Society	Patriotic	45
American Historical Association	Educational	8 45
American Hospital Association	Charitable	15
American Jewish Congress	Religious	30
American Jewish Joint Distribution Committee	Charitable	30
American Labor Party	Political	39
American Law Institute	Civic	3 15
American Legion	Patriotic	7 08
American Legion Auxiliary	Charitable	15
American Library Association	Educational	1 15
American Medical Association	Scientific	13 15
American Museum of Natural History	Scientific	15
American Museum of Natural History in N. Y. (see Museum of Science & Industry in Chi.)		
American Pharmaceutical Association	Business	14
American Philosophical Society	Educational	34
American Red Cross	Charitable	11 38
American Retail Federation	Business	15
American Road Builders Association	Business	15
American Scientific Congress (see Pan-American Union)		
American Society for the Control of Cancer	Charitable	30
American Society of International Law	Business	30
American Society for the Prevention of Cruelty to Animals	Civic	30
America's Town Meeting of the Air (see Town Hall, Inc.)		
American Vocational Guidance Society	Educational	15
American Woman's Association	Civic	25

[fol. 303]		Total Time Hr. Min.	
Organisation	Classification		
American Youth Commission (see American Council on Education)			
American Youth Congress	Political	1	54
Animal Looks at the World (see American Museum of Natural History)			
Argentine Meteorological Expedition	Scientific		10
Army Information Service (see Dept. of War)			
Army Maneuvers (see Dept. of War)			
Art for Your Sake (see National Art Society)			
Art of Living (see Federal Council of Churches of Christ in America)			
Ashland Ohio Symphony Orchestra	Cultural		30
Book Week Committee Inc.	Cultural	1	00
Boy's Club	Civic		15
Boy Scouts	Civic	1	00
British War Relief Society	Charitable		30
Buhl Planetarium	Scientific		15
California Alumni Association University Explorers	Scientific		30
California Institute of Technology (see Stanford University)			
Call to Youth (see Federal Council of Churches of Christ in America) (see Natl. Council of Catholic Women) (see Union of American Hebrew Congregation)			
Calling All Stamp Collectors (see Natl. Federation of Stamp Clubs)			
Catholic Charities	Charitable		45
Catholic Hour (see Natl. Council of Catholic Men)			
Central City Play Festival	Cultural	1	00
Chautauqua	Cultural	7	00
Chicago Ban Association	Business		30
Chicago Better Business Bureau	Business		30
Chicago City Opera	Cultural	1	00
Chicago Motor Club	Business		15
Chicago Philharmonic	Cultural	1	30
Chicago Symphony	Cultural	3	43
Child Grows Up (see Dept. of Labor)			
Childrens Book Week (see Book Week Committee Inc.)			
Children's Crusade for Children	Charitable	1	40
China Aid Council	Charitable		30
China Emergency Relief Committee	Charitable		15
Christian Foreign Service Convocation (see Foreign Missions Conference of North America)			
Christian Science Committee on Publications	Religious		45
Cincinnati Bach Society	Cultural	1	00
Cincinnati Summer Opera Association	Cultural	1	40
Cincinnati Symphony	Cultural	1	40
Citizens Committee of 1,000	Political		15
Citizenship Educational Service Inc.	Patriotic		05
Civil Aeronautics Authority	Governmental		15
Civil Service Commission	Governmental		13
Civilian Conservation Corps	Governmental		27
Cleveland Symphony Orchestra	Cultural		30
Coast Guard (see Dept. of Treasury)			
Columbia University	Educational	1	03
Committee to Defend America by Aiding the Allies	Political		54
Committee to Defend America by Keeping out of War	Political		13
Communist Party of the U. S.	Political		30

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Organization	Classification	Total Time Hr. Min.
Community Chest & Councils Inc.	Charitable	1 00
Congress of Industrial Organizations	Labor	2 56
Consumers Council (see Dept. of Interior)		
Coolidge, (Elizabeth Sprague) Foundation	Cultural	2 30
Colorado Exposition Commission	Governmental	2 00
Council Against Intolerance in America	Educational	15
Curtis Institute of Music	Cultural	3 30
Daughters of American Revolution	Patriotic	35
Democratic National Committee	Political	41 42
Democratic State Committee	Political	1 00
Department of Agriculture	Farm & Governmental	268 50
Department of Interior	Governmental	15
(see General Federation of Women's Clubs)		
Department of Justice	Governmental	3 00
Department of Labor	Governmental	13 55
Department of the Navy	Governmental	2 51
Department of State	Governmental	15
Department of Treasury	Governmental	45
Department of War	Governmental	4 13
Detroit Symphony	Cultural	30
Doctor's at Work (see American Medical Association)		
Douglas County of Nebraska Republican Women's Club	Political	43
Drug Topics	Business	25
Eastman School of Music	Cultural	11 30
Economic Club of New York	Business	1 01
El Paso County Ministerial Alliance	Religious	30
Engineering Society of Western Pennsylvania	Business	30
English Speaking Lodges of the Oration Fraternal Union of America	Patriotic	15
English Speaking Union of the United States	Educational	15
Fahnestock Expedition	Scientific	43
Farm & Home Hour (see U. S. Dept. of Agriculture)		
(see Co-operating Governmental Agencies)		
Federal Bar Association	Business	27
Federal Communications Commission	Governmental	43
Federal Council of Churches of Christ in America	Religious	134 45
Federal Works Agency	Governmental	46
Federation of Young Republican Groups of Greater N. Y.	Political	15
Federation for Support of Jewish Philanthropic Societies	Charitable	31
Field Museum of Natural History in Chicago	Scientific	7 00
First Aid Week (see National Association of Retail Druggists)		
First General International Conference of the Methodist Church	Religious	30
Foreign Missions Conference of North America	Charitable	30
Foreign Policy Association	Educational	12 00
Friday Night Army Show (see Dept. of War)		
Friends of Library (see American Library Association)		
Front Page Ball (see New York Newspaper Women's Club)		
Gallant American Women (see U. S. Office of Education)		
General Electric Research Laboratory	Business	45

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Organization	Classification	Total Time Hr. Min.
General Federation of Women's Clubs	Civic	20 00
General Motors	Business	30
Geographical Society of America	Scientific	15
Girl Reserve Secretaries (see Y. W. C. A.)		
Girl Scouts	Civic	30
Goddard College	Educational	15
Gold Star Mothers	Patriotic	30
Golden Rule Foundation	Civic	30
Governors Conference	Civic	15
Government Committee for National Art Week (see Federal Works Agency)		
Grand Jury Association of New York County	Civic	30
Greater New York Federation of Churches	Religious	1 00
Greater New York Fund	Charitable	5 00
Greater New York Safety Council	Civil	05
4-h Club	Farm	25
Hadassah	Religious	25
Highlights of the Bible (see Federal Council of Churches of Christ in America)		
Hi-Y Congress (see Y. M. C. A.)		
Howard University	Educational	30
How Do You Know (see Field Museum of Natural History in Chicago)		
I Am An American Citizenship Foundation	Patriotic	31
"I Am an American"—series (see Dept. of Justice & Dept. of Labor)		
Illinois Manufacturing Association	Business	29
Indiana Editorial Association	Political	30
Indiana Republican Organization	Political	30
Institute of Public Affairs	Civic	29
International Association Printing House Craftsmen	Labor	30
International Brotherhood of Teamsters, Chauffeurs, Stablemen, & Helpers of America (see American Federation of Labor)		
International Federation of Business & Professional Women	Civic	30
International Petroleum Exposition	Business	30
International Police Chiefs Association	Civic	30
Jewish Education Association	Religious	30
Jewish Forum	Charitable	26
Johnson County Missouri Republican Committee	Political	29
Kansas City Philharmonic	Cultural	1 00
Kansas Day Republican Club	Political	30
Keep American Out of War Congress	Political	45
Kiwanis International	Civic	30
Knights of Columbus	Religious	30
Laymen's Crusade for Christian Education of the International Council of Religious Education	Religious	15
Library of Congress	Governmental	14 45
Lord & Taylor	Business	30
Los Angeles Philharmonic	Cultural	1 22
Man and the World (see Museum of Science & Industr. in Chicago)		
Maritime Day (see National Maritime League)		

Organization	Classification	Total Time Hr. Min.
ary Miller Vocational High School	Cultural	30
edical Society of the State of N. Y.	Scientific	28
Medicine in the News" (see American Medical Association)		
erchants Association of N. Y.	Business	15
essage of Israel (see United Jewish Laymen's Committee)		
etropolitan Junior Achievement Inc.	Civic	15
etropolitan Opera Association	Cultural	52 57
etropolitan Opera Guild	Cultural	1 15
idwestern Music Camp	Cultural	30
ilitary Order of World War	Patriotic	30
ilitary Training Camp Association	Patriotic	15
inute Men of America	Patriotic	15
obilization for Human Needs (see Community Chest Councils)		
ontreal Symphony	Cultural	2 57
other's Day (see Golden Rule Foundation)		
useum of Modern Art	Cultural	2 30
useum of Science & Industry in Chicago	Scientific	2 30
usical Adventures	Cultural	15
usic Educators National Conference	Cultural	15 30
ational Advertised Brands (see Drug Topics)		
ational Advisory Committee on Women's Participation at World's Fair	Civic	15
ational Art Society	Cultural	8 30
ational Association of Automobile Dealers	Business	1 00
ational Association for the Advancement of Colored People	Civic	26
ational Association of Broadcasters	Business	45
ational Association of Cost Accountants	Business	18
ational Association of Manufacturers	Business	5 17
ational Association of Mutual Savings Banks	Business	15
ational Association of Purchasing Agents	Business	30
ational Association of Real Estate Boards	Business	15
ational Association of Retail Druggists	Business	13
ational Association of Retail Grocers	Business	15
ational Association of Teachers of Speech	Educational	25
ational Automobile Association	Business	25
ational Board of Fire Underwriters	Business	29
ational Catholic Welfare Conference	Charitable	25
ational Committee on Cause & Cure of War	Political	30
ational Committee for Music Appreciation	Civic	30
ational Conference of Christians & Jews	Religious	37
ational Council of Catholic Charities	Charitable	1 00
ational Council of Catholic Men	Religious	26 30
ational Council of Catholic Women	Religious	4 15
ational Council of Jewish Women	Religious	15
ational Council of Teachers of English	Educational	15
ational Council of Teachers of Speech	Educational	15
ational Council of Women of U. S., Inc.	Civic	2 45
ational Defense Commission	Governmental	57
ational Democratic Clubs	Political	30
ational Educational Association of the U. S.	Educational	1 30
ational Farm & Home Hour (see Dept. of Agriculture)		
ational Federation of Music Clubs	Cultural	3 00
ational Federation of Stamp Clubs	Educational	13 00
ational First Aid Week (see National Association Retail Druggists)		

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Organisation	Classification	Total Time	
		Hr.	Min
National Foundation for American Youth	Political		15
National Foundation of Infantile Paralysis	Charitable	5	59
National Geographic Society	Scientific		27
National Hotel Association	Business		23
National Interfraternity Council	Educational		23
National Labor Relations Board	Governmental		15
National League of Women Voters	Political		15
National Maritime League	Business	1	00
National Metal Congress Exposition	Business		15
National Music Week Committee	Cultural	1	45
National Music Camp	Cultural	10	00
National Negro Congress	Civic		44
National Petroleum Association	Business		30
National Philharmonic Symphony	Cultural	1	00
National Press Club	Business		39
National Public Housing Conference, Inc.	Civic		29
National Radio Demonstration Debate (see National University Extension Association)			
National Radio Forum (see Washington Evening Star)			
National Republican Club	Political	5	00
National Resources Planning Board	Governmental	5	00
National Security League	Patriotic & Political		44
National Society of New England Women	Patriotic		15
National Sojourners	Patriotic		30
National Symphony Orchestra	Cultural	1	30
National Tuberculosis Association	Charitable		15
National University Extension Association	Educational	1	00
National Urban League	Civic		15
National Vespers (see Federal Council of Churches of Christ in America)			
National Youth Administration	Governmental		30
(see N. Y. A Radio Workshop)			
New Friends of Music	Cultural	15	57
News Welfare Association	Charitable	2	27
Newspaper PM Inc.	Business		15
New York City Water Supply Control Department	Civic		30
New York Federation of Music Clubs	Cultural		15
New York Herald Tribune	Civic	9	02
New York Newspaper Women's Club	Business		15
New York State Conference on Social Work	Civic		13
New York State Federation of Labor	Labor		25
New York State Health Department	Civic		13
New York World's Fair	Business	28	06
Northern Baptist Church	Religious		30
Northern Ohio Opera Association	Cultural	1	00
Northwestern University	Scientific		30
Olivet College	Cultural		15
Oregon Republican Club	Political		30
Paderewski Fund for Polish Relief	Charitable		45
Palestine Conservatory of Music in Jerusalem	Charitable		44
Pan-American Union	Governmental	4	23
Parents Magazine	Educational		22
Parent Teachers Association	Educational		30
Pennsylvania Society	Political		26
Peoples Lobby, Inc.	Political	1	45
People's Mandate	Patriotic		15
Pharmacy Week (see American Pharmaceutical Association)			

[Col. 2018]	Organization	Classification	Total Time Hr. Min.
	Phi Beta Kappa	Educational	15
	Phi Mu Alpha Sinfonia Fraternity	Cultural	15
	"Pilgrimage of Poetry" (see Library of Congress)		
	P M, Inc. (see newspaper PM, Inc.)		
	Police & Fire Dept. Toy Campaign	Charitable	10
	Poor Richard Club	Civic	30
	Port of New York Authority	Civic	15
	Presbyterian General Assembly	Religious	09
	President's Birthday Ball (see National Foundation for Infantile Paralysis)		
	Progressive Education Association	Educational	30
	Prohibition Party of the U. S.	Political	15
	Propeller Club (see National Maritime League)		
	Protestant Episcopal Church	Religious	30
	Public Affairs Committee, Inc.	Educational	1 30
	Radio Pulpit (see Federal Council of Churches of Christ in America)		
	Radio Workshop (see Mary Miller Vocational High School)		
	Raising a President (see Dept. of Labor)		
	Red Cross (see American Red Cross)		
	Religion in the News (see Federal Council of Churches of Christ in America)		
	Republican Club of Massachusetts	Political	30
	Republican Mass Meeting (Nebraska)	Political	1 20
	Republican National Committee	Political	47 11
	Republican State Committee	Political	1 17
	Reserve Officers Association	Patriotic	12
	Rochester Civic Orchestra	Cultural	19 00
	Rochester Philharmonic	Cultural	6 00
	Rotary International	Civic	30
	Salvation Army	Charitable	1 13
	San Francisco Church Federation	Religious	30
	San Francisco Fair	Business	53
	San Francisco Opera Association	Cultural	2 51
	San Francisco Symphony	Cultural	1 00
	Scholastic Magazine	Cultural	30
	Scholastic Press Association (see Columbia University)		
	Science on the March (see American Association for the Advancement of Science)		
	Sigma Alpha Epsilon Fraternity	Educational	14
	Sixth Avenue Association	Business	15
	Smith College Alumni Association	Educational	15
	Socialist Party of the U. S.	Political	1 41
	Society of the Friendly Sons of St. Patrick	Patriotic	30
	Sons of the American Revolution	Patriotic	20
	Southern Baptist Church	Religious	24
	St. Louis Cooperative Employment Council	Civic	30
	St. Louis Opera Association	Cultural	55
	Stanford University	Scientific	4 00
	State Charities Aid Association	Charitable	15
	Sunday Vespers (see Federal Council of Churches of Christ in America)		
	Synagogue Council of America	Religious	1 00
	"This Our America" (see National Resources Planning Board)		

[1911, 1912]	Organization	Classification	Total Time Hr. Min.
	Topeka Chamber of Commerce	Business	30
	Toronto Promenade Symphony	Cultural	4 15
	Town Hall, Inc.	Educational	24 30
	Townsend Plan Organization	Political	15
	Traveler's Aid Society	Charitable	24
	Twentieth Century Fund	Charitable	3 15
	Tuskegee Institute	Educational	45
	Union of American Hebrew Congregation	Religious	4 30
	United Auto Workers (see Congress of Industrial Organizations)		
	United Brotherhood of Carpenters & Joiners of Amer- ica (see American Federation of Labor)		
	United Hospital Fund of N. Y.	Charitable	27
	United Jewish Laymen's Committee	Religious	26 00
	United Lutheran Church	Religious	15
	United Mine Workers (see Congress of Industrial Organizations)		
	U. S. Army Recruiting Programs (see U. S. Military Academy)		
	U. S. Chamber of Commerce	Business	1 46
	U. S. Committee for the Care of European Children	Charitable	15
	U. S. Conference of Mayors	Civic	30
	U. S. Junior Chamber of Commerce	Business	59
	U. S. Marine Corps	Governmental	30
	U. S. Military Academy	Governmental	2 30
	U. S. Office of Education	Governmental	38 45
	U. S. Public Health Service	Governmental	15
	U. S. Secret Service (see Dept. of Treasury)		
	University & College Glee Clubs	Educational	8 00
	University Broadcasting Council of University of Chi- cago (see Field Museum of Natural History of Chicago)		
	University of California (see Stanford University)		
	University of Chicago	Educational	26 00
	University of Cincinnati, Oratorio Society	Educational	1 00
	University of Pennsylvania	Educational	1 07
	University of Rochester	Educational	1 09
	University of Virginia	Educational	48
	University of Wisconsin	Educational	1 00
	Unlimited Horizons (see Stanford University)		
	Vassar College	Educational	20
	Vermont State Republican Club	Political	29
	Veterans of Foreign Wars	Patriotic	3 34
	Veteran Wireless Operators Association	Scientific	15
	Vocational Guidance Association (see American Association for Adult Education)		
	Vocational Service for Juniors	Civic & Educational	45
	Washington Evening Star	Political	15 30
	Washington State Republican Club	Political	29
	Westminster College	Cultural	30
	White House Conference on Children in a Democracy	Charitable	1 26
	Winston-Salem, N. C., Chamber of Commerce	Business	30
	Women's National Republican Club	Political	59
	Women's Symphony Orchestra	Cultural	1 30
	Woodmen of the World Life Insurance Society	Business	30
	Worker's Education Bureau of America	Labor	15
	World Is Yours (see U. S. Office of Education)		
	World Peaceways, Inc.	Political	15
	Young Democratic Clubs	Political	46

[col. 400]	Organization	Classification	Total Time Hr. Min.
	Young Men's Christian Association	Civic	45
	Young People's League of the United Synagogue of America	Religious	30
	Young Republican Club of North Carolina	Political	29
	Young Republican League of Iowa	Political	25
	Young Women's Christian Association	Civic	13
	Youth Builders', Inc.	Civic	22
	Youth Committee Against War (see Keep America Out of War Congress)		
	Youth To-day Magazine	Educational	30

Organization time shown includes local broadcasts on WEAJ and WJZ.

EXHIBIT "E" TO AFFIDAVIT

Outstanding Public Service Programs

NBC Red & Blue Networks

1941

NBC Symphony Tuesday Blue 9:30-10:30 PM

Symphonic music conducted by outstanding conductors. Currently—Leopold Stokowski. Last year—Arturo Toscanini.

November 13th, 1937—to date.

National Farm and Home Hour

Mon-Fri Blue 12:30-1:00 PM

Saturday Blue 12:30-1:30 PM

News, music and information of special interest to farmers and homemakers. Cooperation U. S. Department of Agriculture.

July 8, 1929—to date.

Music Appreciation Hour Friday Blue 2:00-3:00 PM

A series of music appreciation programs dedicated to schools and colleges of the United States; conducted by Dr. Walter Damrosch. Programs graded to suit mentality of pupils of both primary and higher grades.

October 26th, 1928—to date.

America's Town Meeting of the Air

Thur Blue 9:15-10:00 PM

Series of forum programs broadcast from floor of Town Hall presenting leaders of various fields of thought in

[fol. 414] of August 1, 1941. This cancellation is pursuant to the terms of our contract which is subject to any rules and regulations of the Commission and is required as a result of the regulations recently adopted by the Commission.

In the event that the effective date of these regulations should be postponed beyond August 1, 1941, the effective date of this cancellation shall be postponed for the same period.

It is our desire to negotiate a revised contract which will conform with the regulations as adopted as soon as is practicable.

Sincerely yours, (Signed) B. Bryan Musselman,
Vice-President.

BBM:om.

EXHIBIT 11

Copy

KYUM, Yuma, Arizona

June 24th, 1941.

National Broadcasting Company, Inc.,
R. C. A. Building, Radio City,
New York City, N. Y.

Re: Radio Station KYUM contract

GENTLEMEN:

At a special meeting of the Board of Directors of the Yuma Broadcasting Company, held on June 19th, 1941, the following Resolution was adopted:

"Whereas, the Federal Communications Commission on May 2nd, 1941, issued an Order in Docket No. 5060, containing Regulations 3.101, 3.102, 3.103, 3.104, 3.105, 3.106, 3.107 and 3.108, and,

"Whereas, such Order and Regulations make necessary some changes in the outstanding contracts of the Yuma Broadcasting Company,

"Therefore, Be It Resolved, that the Board of Directors of the Yuma Broadcasting Company instruct its man-

[fol. 401] American political, economic life in discussion of current problems.

May 30th, 1935—to date.

University of Chicago Round Table

Sun Red 2:30-3:00 PM

Discussion of the current topics of political, economic and social interest by members of University of Chicago faculty and prominent leaders in above field of interest.

February 1st, 1931—to date.

Rochester Civic Orchestras

Fri Blue 10:00-10:30 PM

Program of classical music.

November 29th, 1929.

Great Plays

Sun Blue 3:00-4:00 PM

Dramatic program showing the development of the drama from the Greek to the present day; featuring outstanding artists from the stage and radio.

February 26th, 1938—to date.

Hemisphere Revue

Wed Blue 9:00-9:30 PM

Variety program built to show the talent of all the Americas, and to cement our feeling of good will; featuring stars from the radio and stage and guest speakers from the South American countries.

May 14th, 1941—to date.

For America We Sing

Mon Blue 9:30-10:00 PM

Musical series under the auspices of the Treasury Department in the interest of Defense Stamps and Bonds—featuring stars from the operatic and concert stage.

July 22, 1941—to date.

Radio City Music Hall

Sunday Blue 12:30-1:30 PM

Program of classical music, operatic renditions of chamber music recitals; conducted by Erno Rapee.

January 14th, 1934—to date.

Good Neighbors

Thursday Red 10:30-11:00 PM

Series presented by NBC to help the people of North America to become better acquainted with our neighbors

[fol. 402] in South America; twenty-two dramatized human interest programs built around the twenty Central and South American republics.

May 22nd, 1941—October 16th, 1941.

America Looks Abroad Sunday Blue 12:00-12:15 PM

Series of programs of non-partisan discussion of current issues by members of Foreign Policy Association under whose auspices the series are run.

October 29th, 1939—to date.

I'm an American Sunday Blue 12:15-12:30 PM

Series of talks by naturalized American citizens telling why they wanted to become an American citizen; outstanding personalities have been interviewed. Produced in cooperation with the U. S. Department of Justice.

May 4th, 1940—to date.

National Radio Forum Monday Blue 9:00-9:30 PM

Discussions of current issues by leading governmental figures—in cooperation with the Washington Star.

January 18th, 1932—to date.

World Is Yours Sunday Red 1:30-2:30 PM

Series of weekly dramatizations of exhibits in Smithsonian Institution in cooperation with Smithsonian Institution and U. S. Office of Education.

June 7th, 1936—to date.

New Friends of Music Sunday Blue 6:05-6:30 PM

Chamber music societies featured from Town Hall stage—Budapest String Quartet and Primrose String Quartet examples of music featured.

January 23rd, 1938—to date.

Between the Bookends

Mon thru Fri Blue 1:15-1:30 PM

Poetry by Ted Malone.

Sept 5, 1938.

[fol. 403] Behind the Mike Sunday Blue 4:30-5:00 PM

Program presenting stories behind programs, personalities and every phase of radio from the entertainment standpoint.

September 15, 1940—to date.

Listen America Sunday Red 3:30-4:00 PM

Dramatizations of the stirring and significant story of America's mighty new quest for health in cooperation with the Women's National Emergency Committee and outstanding speakers in government and public life.

June 13th, 1941—to date.

Story Behind the Headlines

Sunday Red 11:15-11:30 PM

Cesar Saerchinger, noted foreign correspondent, discussing news events of the week, with sketch of historical background leading up to it. Program in cooperation with American Historical Association.

March 4th, 1938—to date.

Spin and Win With Jimmy Flynn

Saturday Blue 9:00-9:30 PM

Quiz type of audience participation program presented in a circus or carnival atmosphere with Master of Ceremonies, Jimmy Flynn, questioning participants from army bases throughout the country in a "barker" style.

November 20th, 1940—to date.

Wake Up America Sunday Blue 2:00-3:00 PM

Hour long radio forum, produced by NBC in cooperation with the American Economic Foundation; devoted to discussions of currently important economic issues by noted speakers. Both sides of the issue are presented.

September 28th, 1941—to date.

Speaking of Liberty Thursday Red 6:30-6:45 PM

Series of programs under auspices of the Council for Democracy. Rex Stout as M. C., brings to the microphone each week authors, journalists, etc. of note, whose work has led them to explore fields of "thinking about democracy".

April 17th, 1941—to date.

[fol. 404] Story Dramas by Olmstead

Monday, Wednesday, Friday Red 11:15-11:30 PM

Dramatized versions of the world's greatest ghost stories, as collected and told by Nelson Olmstead.

September 30th, 1940—to date.

Raising a President Monday Blue 11:30-11:45 AM

Program directed toward mothers, regarding the care and guidance of their children, presented in cooperation with the Children's Bureau, U. S. Department of Labor. In a "Court of the Air" type of presentation, problem letters of parents are dramatized and then discussed by a panel composed of one parent and two child guidance experts.

October 2nd, 1940—to date.

What Can I Do Thursday Blue 11:45-12:00 Noon

Program answering the question of American women who want to do their part in defense. Sylvia Porter, finance editor gives economic side of picture. Defense news of week as it concerns women is given. June Hynd interviews a woman who has an active place in the defense picture.

July 31st, 1941—to date.

Alma Kitchell's Streamline Journal

Tuesday Blue 11:30-12:00 Noon

A program where one of radio's most popular artists meets her friends in an intimate period of visiting in which she tells new facts about broadcasting and the people engaged in it; brings visitors to the microphone.

December 4th, 1939—to date.

Travelling Cook Thursday Blue 11:00-11:15 AM
Friday " " " "

Richard Kent, bringing romance to the kitchen in a series of broadcasts featuring fool-proof recipes from every corner of the globe.

November 14th, 1939—to date.

Defense for America Saturday Red 7:00-7:30 PM

Series of programs in cooperation with the National Association of Manufacturers dealing with American industry

actually at work on National Defense projects. Industry's [fol. 405] weekly report to the nation on the progress of national defense production.

February 22nd, 1941—October 25th, 1941.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRANK E. MULLEN, VICE-PRESIDENT AND GENERAL MANAGER OF NATIONAL BROADCASTING COMPANY, INC.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

Frank E. Mullen, being duly sworn, deposes and says:

I am Vice-President and General Manager of National Broadcasting Company, Inc. (hereinafter called "NBC"), one of the plaintiffs herein. This affidavit is made in opposition to defendants' motions to dismiss the complaint or, in the alternative, for summary judgment.

The effect of the issuance by the Federal Communications Commission of its Order relating to chain broadcasting on May 2, 1941, in Docket No. 5060 (Exhibit D to the verified complaint herein), has been forcibly called to my attention by the large number of letters received from independently operated affiliates of NBC, cancelling their respective affiliation contracts with NBC or refusing to abide by the terms of existing affiliation contracts.

As stated in the affidavit submitted by Niles Trammell, President of NBC, in support of plaintiffs' motion for a preliminary injunction, between May 2, 1941, and October 30, 1941, not less than 48 affiliated stations having effective contracts of affiliation with NBC containing one or more provisions of the types described in the Commission's Order, served notice upon NBC of cancellation of said contracts or of refusal to abide by the existing terms thereof.

Copies of 15 representative letters are hereto annexed and marked Exhibits 1 to 15, inclusive.

Unless a preliminary injunction is granted in this action, substantially all of NBC's affiliated stations will take similar [fol. 406] action to cancel their existing affiliation contracts or to refuse to abide by their terms.

Frank E. Mullen.

Subscribed and sworn to before me this 3rd day of January, 1942. Florence E. Marger, Notary Public. Queens Co. No. 2625, Reg. No. 6868. Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369. Commission Expires March 30, 1943. (Seal.)

Exhibits to Affidavit of Frank E. Mullen

EXHIBIT 1

Copy

(WPTF Letterhead)

Raleigh, N. C.—June 4, 1941.

Mr. William S. Hedges, Vice-President, National Broadcasting Company, Inc., New York, N. Y.

DEAR MR. HEDGES:

You may regard this letter as our formal notice of cancellation of affiliation contract between the National Broadcasting Company and the WPTF Radio Company, dated April 15, 1939, said cancellation to become effective August 2, 1941. We are exercising this cancellation privilege as provided in paragraph fifteen of the contract aforementioned, inasmuch as said contract is in conflict with Federal Communications Commission regulations 3.101, 3.102, 3.103, 3.104, 3.106, 3.107, and 3.108 (Commission Order in Docket No. 5060, May 2, 1941).

The above cancellation notice applies likewise to the agreements set forth in your letters of December 30, 1940, and January 8, 1940, which were written as supplements to the affiliation contract dated April 15, 1939.

While we are issuing this formal cancellation notice in regard to the contract above mentioned, we shall be glad to enter into negotiations with the National Broadcasting Company with the view toward executing another affiliation

contract which will comply in all respects with and be sub-
[fol. 407] ject to all rules and regulations now in effect or
hereinafter promulgated by the Federal Communications
Commission.

Sincerely yours, (Signed) J. R. Weatherspoon.

EXHIBIT 2

Copy

W H K Y

Hickory, North Carolina,
May 17, 1941.

The National Broadcasting Company, R. C. A. Bldg., Radio
City, New York, N. Y.

Attn: Mr. Phil Merryman

DEAR MR. MERRYMAN:

I have just received a copy of The Rules and Regulations promulgated by the Commission pursuant to the Report on Chain Broadcasting.

Upon examination of Rules 3.101 to 3.108 inclusive, it clearly appears that our present contract with you will be illegal after July 31, 1941. Unless this effective date of the Rules and Regulations is extended, in one manner or another by appropriate authority, it is our desire to consummate a new arrangement with you on or before that date. Undoubtedly you have given considerable study to this matter and we would appreciate receiving any suggestions as to an appropriate form of contract.

It appears also that our license would be in jeopardy should we continue our affiliation with you after the effective date of the above-mentioned Rules, unless you have divested yourself of one of the two networks which you now own. Before we could legally enter into any new arrangement with you, therefore, it would be necessary that we receive your warranty that the Rules and Regulations of the Commission have been satisfied in this respect.

It is our desire to continue our affiliation with your network but naturally we can not do so at the expense of our license.

[fol. 408] We would appreciate your early advice in regard to this matter.

Yours very truly, Catawba Valley Broadcasting Co.,
Inc. (Signed) W. T. Hix, Manager.

h.

EXHIBIT 3

True Copy

W J D X

Jackson, Miss.

July 3, 1941:

National Broadcasting Company, New York, N. Y.

Attention Mr. William Hedges

DEAR BILL:

At the suggestion of our legal representatives we are writing in reference to our network affiliation agreement dated March 15, 1935, together with supplement of November 4, 1940, an addition thereto, between The Lamar Life Insurance Company and the National Broadcasting Company for the use of the facilities of Broadcast Station WJDX, located at Jackson, Mississippi. We are assuming that this agreement will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108 inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we assume that both you and we are to and will construe the agreement above mentioned in such a way as to comply with said rules.

So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest possible opportunity.

[fol. 409] Needless to say, I hope the rule will never be put into effect, but that we may conform to the legal requirements please see that this is given the necessary attention.

Cordially and sincerely yours, (Signed) Wiley
Harris, W. P. Harris, Director Lamar Life Station
WJDX.

WPH:S.

EXHIBIT 4

Copy

Phoenix Republic and Gazette

June 23, 1941.

Mr. Niles Trammell, President, National Broadcasting Company, RCA Building, 30 Rockefeller Plaza, New York City, N. Y.

DEAR NILES:

You more than anyone else, I believe, have a present appreciation of how time is moving on at a terrifically fast rate.

August 2 will be here before we will realize it and unless there is a change in the effective date of the Commission's recent regulations 3.101 to 3.108, it will have been essential that there shall have been established a new relationship between KTAR and KVOA and the National Broadcasting Company. Such a relationship will of course have to give effectiveness to the new rules and unless such is established, or unless the order is rescinded, or the effective date delayed, it is apparent that it will be necessary for us to cancel the effectiveness of the present contract.

At Yuma's request their letter has been sent to you and Safford has been talking over the telephone with us for a number of days.

We have explained to them that it is not to be doubted that you will be sending along that which will be representative of the kind of a relationship you will hope to establish in lieu of that which will have been outlawed, if that comes to pass.

This letter has as its purpose to ask you to give us your proposal as an acceptable substitute for present contracts [fol. 410] for KTAR and KVOA, as well, as, we would presume, Safford and Yuma,

Sincerely yours, W. W. Knorpp.

W. W. Knorpp-n.

EXHIBIT 5

Copy

WEBC, Duluth, Minn.

June 11th, 1941.

Mr. William S. Hedges,
National Broadcasting Company, Inc.,
New York, N. Y.

GENTLEMEN:

We are faced with the necessity of complying with the recently adopted rules of the Communications Commission relating to stations engaged in chain broadcasting and accordingly give you notice herewith of cancellation of our affiliation agreement with your company effective as of August 1, 1941, when we understand the new rules are effective. Should this effective date be postponed by action of the Commission, or otherwise, the effective date of this cancellation is similarly deferred.

We believe that programs which you sponsor and make available to us are of great value to us in enabling our station to operate in the public interest. For this reason, we would like the opportunity of considering a new form of agreement with you, conforming to present rules and regulations of the Federal Communications Commission, which will enable us to continue to broadcast your programs.

Very truly yours, Central Broadcasting Company.
By W. C. Bridges (Signed).

[fol. 411]

EXHIBIT 6

Copy

KPRC, The Houston Post

July 16, 1941.

Mr. Niles Trammell, President,
National Broadcasting Company,
New York City, N. Y.

DEAR MR. TRAMMELL:

With reference to the affiliation contract of Radio Station KPRC with the National Broadcasting Company, I note that the orders of the Commission, adopted on May 2, 1941, relating to these contracts, become effective on August 2, 1941.

I, therefore, wish to inform you that on and after the effective date of these orders, on behalf of Radio Station KPRC, we will consider all parts of this affiliation agreement which are in conflict with the above orders as repealed and nullified by these orders.

Very truly yours, (Signed) W. P. Hobby, President,
Houston Printing Corporation.

WPH/lc.

EXHIBIT 7

Copy

Flint Broadcasting Company
Flint, Mich.

May 27, 1941.

National Broadcasting Company
RCA Building
New York, N. Y.

Attn: Mr. William S. Hedges

GENTLEMEN:

Please be advised of our intention to cancel our contract with the National Broadcasting Company and the King-

Trendle Broadcasting Corporation dated August 31, 1938, [fol. 412] cancellation to be effective as of the close of business July 31, 1941; and cancellation to take effect unless there should be a postponement of the regulations of the Federal Communications Commission issued May 2, 1941.

Kind regards.

Sincerely yours, (signed) Howard M. Loeb, Managing Director, Flint Broadcasting Company.

HMLoeb.

RD.

cc: King-Trendle Broadcasting Corp.

EXHIBIT 8

True Copy

The Kansas City Star

July 3, 1941.

National Broadcasting Company, Inc.
Radio City, Rockefeller Plaza
New York, New York

GENTLEMEN:

You are hereby notified that the undersigned cancels and terminates the agreement heretofore existing between you and the undersigned, dated September 22, 1936, such termination and cancellation to be effective as of July 31, 1941.

It is the desire of the undersigned, as the operator of station WDAF, to make programs broadcast by your network available to its listeners under arrangements conformable to the Federal Communications Act and lawful regulations of the Federal Communications Commission. We desire to enter into negotiations with your company for a new contract, and suggest that a conference be arranged for discussion of terms in the near future.

Yours very truly, The Kansas City Star-Company.
By (Signed) Earl McCollum, Vice President,
Owner and Operator of Radio Station WDAF.

[fol. 413]

EXHIBIT 9

True Copy

City of St. Petersburg, Florida

July 16, 1941.

National Broadcasting Company
R. C. A. Building
New York City

Attention: Mr. William H. Hedges, Vice President

DEAR MR. HEDGES:

Please take notice that pursuant to the Commission's order in Docket 5060 in the matter of the investigation of chain broadcasting promulgated on May 2, 1941, we are hereby canceling the agreement between the City of St. Petersburg and your Company, dated November 26, 1940, the cancelation to become effective on August 2, or on such other date as the Commission might designate as the effective date of its order.

It is the desire of the City of St. Petersburg to continue its affiliation with the National Broadcasting Company and we are now prepared and are willing to enter into a new agreement which will be consistent with the Commission's regulations.

Yours very truly, (Signed) G. V. Leland, City Manager.

EXHIBIT 10

Copy

Lehigh Valley Broadcasting Co.

Allentown, Pennsylvania

May 26, 1941.

National Broadcasting Company
30 Rockefeller Plaza
New York, N. Y.

GENTLEMEN:

This is formal notice of our desire to cancel our affiliation contract with the National Broadcasting Company as

agement to effectuate a new contract, which will meet the terms of the Order, with any concern with whom this corporation now has a present contract, to take the place [fol. 415] of such existing contract, in the event that the said Order and Regulations are not modified or revised, or their effective date postponed, and, in the event that a new contract, which will permit radio station KYUM operated by this company to operate strictly in accordance with the Orders and Regulations of the Commission, cannot be effectuated that then all necessary steps be taken to terminate any contract in conflict with such Orders and Regulations."

Our contract with you, as you know, consists of the offer contained in your letter of February 8th, 1940, and our acceptance thereof indorsed thereon.

Since the making of the Order by the Commission we have studied the contract with a view of determining, if we could, what changes would have to be made therein to conform with the regulations of the Commission now in effect, and which, of course, must be complied with. We have come to the conclusion that the necessary changes or modifications are so great that it is useless for us to make any suggestions until we know what your Company intends to do, since, as we understand the Regulations, this Station will not be permitted thereunder to continue the acceptance of network services from you, to do so being in violation of Sections 3.106 and 3.107, relating to the ownership by network companies of two networks and of two stations covering the same market.

We have appreciated very much the network services furnished us by you, and would like to continue network services from you if a contract can be worked out, which is not in conflict with the regulations. In the event that such a contract cannot be worked out, and, in the further event that the Order and Regulations of the Commission are not modified, or revised, or more time not given in which to determine whether a contract can be drawn that is acceptable under the Commission's regulations, it will be necessary for us to discontinue your network services at the end of the prescribed 90 day period.

Under the circumstances, we would appreciate it very much if you would submit for our consideration and acceptance such modified or revised contract as your company

believes will meet the requirements of the Regulations of the Commission. We make this request as we are not in [fol. 416] position to know what your company plans to do, or what network services you will be in position to offer.

Yours very truly, Yuma Broadcasting Company, By
(Signed) John H. Huber, President.

RNC/Mc.

EXHIBIT 12

Copy

Memphis Publishing Company

Memphis, Tennessee

June 16, 1941.

National Broadcasting Co.
RCA Building Radio City
New York City

GENTLEMEN :

In view of the provisions of Section- 3.107, 3.108 and other pertinent regulations of the Federal Communications Commission published May 2, 1941; we are under the necessity of advising you of our intention to discontinue the affiliation contract of WMC with your company, effective at the close of business July 31, 1941, unless :

"The effective date of the Commission's regulations is postponed," or

"Your company places itself in a position where we are free to negotiate a contractual affiliation conformable to the regulations."

Very truly yours, Memphis Publishing Company,
Enoch Brown, Jr., Vice President & General Manager.

[fol. 417.]

EXHIBIT 13

Copy

KSOO

KELO

Sioux Falls, S. D.

June 20, 1941.

Mr. William S. Hedges
Vice-President in Charge of Stations
National Broadcasting Company
RCA Building Radio City
New York City

DEAR BILL:

In accordance with the new Rules and Regulations of the Federal Communications Commission concerning the chain affiliations of station licenses, we are writing you regarding the KSOO and KELO affiliation contracts with the National Broadcasting Company.

As you know, KSOO is at present affiliated with the National Broadcasting Company as a member of the basic supplementary Red and Blue Networks. KELO is likewise at present a member of the basic supplementary Red and Blue Networks, taking network service after KSOO is no longer available.

Under the new Rules and Regulations of the Federal Communications Commission, we are notifying you that we are cancelling our present affiliation contracts for KSOO and KELO with the National Broadcasting Company. Our cancellation will take effect as of the close of business July 31, 1941. We will be glad to enter into a new affiliation agreement with you subject to the new Rules and Regulations of the Federal Communications Commission with respect to network operations, and we will look forward to a resumption of relations in compliance with these new Rules and Regulations.

Kind regards.

Sincerely yours Sioux Falls Broadcast Ass'n Inc.,
Joseph Henkin, President.

JH:S.

[fol. 418]

EXHIBIT 14

True Copy

WBAL

Baltimore, Md.

July 3, 1941.

National Broadcasting Company, Inc.
RCA Building, Radio City
New York, New York

GENTLEMEN:

The WBAL Broadcasting Company (Radio Station WBAL) now has a contract with the National Broadcasting Company, dated October 29, 1936, for the broadcasting of NBC programs. The WBAL Broadcasting Company also has a contract with the National Broadcasting Company dated November 26, 1940, as modified on December 5, 1940 and February 14, 1941, which goes into effect on October 1, 1941, under the terms of which WBAL will broadcast programs of the red network.

Both of these contracts contain provisions which appear to be in conflict with the rules and regulations promulgated by the Commission as a result of the network investigation. We are advised that it will be necessary to modify both of these contracts by August 1, 1941, unless the effective date of these new regulations is postponed by the Commission.

This is to advise you that we stand ready to perform our contracts with your company in so far as the terms of these contracts are not in conflict with the Commission's rules and regulations.

Very sincerely yours, WBAL Broadcasting Company, by (Signed) H. C. Burke, President.

[fol. 419].

EXHIBIT 15

Copy

KGW KEX

Portland, Oregon

June 5, 1941.

Mr. William S. Hedges
National Broadcasting Co., Inc.
RCA Building
New York, New York

DEAR MR. HEDGES:

From a consideration of the recent regulations of the Federal Communications Commission with reference to network affiliation agreements, we are apparently faced with the necessity of amending the existing affiliation agreements with your company affecting the operation of our Stations KGW and KEX.

The effect of these regulations indicates that existing licenses of broadcasting facilities must present satisfactory evidence to the Commission concerning the contractual relations insofar as the same apply to network operations, and in this connection we would now invite a statement from your company indicative of its desires and intentions with respect to the changes in our existing contracts that may be necessary to meet the Commission requirements.

We are, of course, willing and desirous of continuing to release the network programs originating from and furnished by your company, and at the same time must comply with the Commission's regulations with respect to such network affiliations.

Would be pleased to have an expression of your views and comments on the procedure to be followed.

Yours very truly Arden X. Pangborn, Managing
Director.

axp lp

[fol. 420] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF PHILIP J. HENNESSEY, JR.

DISTRICT OF COLUMBIA,

Washington, ss:

Philip J. Hennessey, Jr., being duly sworn says:

I am a lawyer engaged in practice at Washington, D. C. Since 1938 I have been of counsel for National Broadcasting Company, Inc., in the proceedings designated Docket 5060 before the Federal Communications Commission under the Commission's Order No. 37. I am familiar with the scope of the Commission's public hearing, the requests for additional information directed to National Broadcasting Company by the Commission after the close of the public hearing, the Report of the Committee dated June 12, 1940, the briefs filed by NBC and others on or about November 12, 1940, the Oral Argument before the Commission on December 2 and 3, 1940, the Supplementary briefs filed with the Commission on January 2, 1941, the Commission's Order of May 2, 1941, and the amendments made to this Order thereafter.

The purpose of this affidavit is to demonstrate:

(a) That the proceedings before the Commission in Docket 5060 were legislative in character rather than judicial and

(b) That the public record of the proceeding in Docket 5060 does not contain any evidence of the economic effect of the Regulations promulgated by the Commission on May 2, 1941, as amended thereafter.

FCC Order No. 37 was issued on March 18, 1938. After reciting that

"The Commission has not at this time sufficient information in fact upon which to base Regulations regarding contractual relationships between chain companies and network stations, multiple ownership of radio broadcast stations of various classes, competitive practices of all classes of stations, networks and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result;"

[fol. 421] The Commission ordered:

"An immediate investigation to determine what special Regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity; such investigation to include an inquiry into the following specific matters, as well as all other pertinent and related matters including those covered in the Report on Social and Economic Data prepared by the Engineering Department of the FCC and filed with the Commission on January 20, 1938."

The "Report on Social and Economic Data on Broadcasting" referred to in Order No. 37 is a volume of 197 pages (printed by the United States Government Printing Office in 1938) after an informal engineering conference which had been held beginning October 5, 1936. The subjects for discussion at this conference were:

1. Classification of broadcast stations.
2. Allocation of frequencies to different classes of stations.
3. Standards to be applied in determining coverage, and the presence or absence of objectionable interference.
4. Geographic distribution of broadcast facilities.
5. Standards and methods of measurements with respect to essential engineering phases of operation of broadcast stations.
6. Apparatus performance requirements to be imposed on broadcast stations.
7. Social and economic effect of any proposals regarding the foregoing subjects.

The nature and scope of the 1936 hearing and the Report which followed it may be gauged from the following paragraphs which appear on page 1 of the introduction:

"In order not to burden the main Report with the detailed discussions of the testimony recorded in the October hearing, and to give some relief to the burden of studying the voluminous record of more than half a million words, exclusive of the vast data contained in the exhibits attached to the record, the Department has made a brief summary of

[fol. 422] the testimony of each witness. This is attached hereto as Appendix C. In briefing summaries such as this, it is difficult to bring out all the points and therefore, final reliance may be had from the record itself.

"In constructing this Report we have utilized data taken from the records of the commission in addition to the testimony at the hearing, and in drawing conclusions we have relied to some extent on our practical experience in broadcasting."

Order No. 37 itself recited 13 subjects upon which the Commission desired information as follows:

1. The contractual rights and obligations of stations engaged in chain broadcasting, arising out of their network agreements.
2. The extent of the control of programs, advertising contracts and other matters exercised in practice by stations engaged in chain broadcasting.
3. The nature and extent of network program duplication by stations serving the same area.
4. Contract provisions in network agreements providing for exclusive affiliation with a single network and also provisions restricting networks from affiliation with other stations in a given area.
5. The extent to which single chains or networks have exclusive coverage in any service area.
6. Program policies adopted by the various national and other networks and chains, with respect to character of programs, diversification, and accommodation of program characteristics to the requirements of the area to be served.
7. The number and location of stations licensed to or affiliated with each of the various national and other networks. The number of hours and the specified time which such networks control over the station affiliates and the number of hours and the specified time actually used by such networks.
8. The rights and obligations of stations engaged in chain broadcasting so far as advertisers having network contracts are concerned.
- [fol. 423] 9. The nature of service rendered by each station licensed to a chain or network organization, particu-

larly with respect to amount of program origination for network purposes by such stations.

10. Competitive practices of stations engaged in chain broadcasting as compared with such practices in the broadcasting industry generally.

11. Effect of chain broadcasting upon stations not affiliated with or licensed to any chain or network organization.

12. Practices or agreements in restraint of trade or furtherance of monopoly in connection with chain broadcasting.

13. Extent and effects of concentration of control of stations locally, regionally or nationally in the same or affiliated interests, by means of chain or network contracts or agreements, management contracts or agreements, common ownership or other means or devices, particularly in so far as the same tends toward or results in restraint of trade or monopoly.

Thereafter a supplementary notice was issued by the Commission on September 20, 1938 which set forth twenty subjects upon which the Commission desired information from NBC and others:

1. Corporate and financial history of network organization including detailed information on both direct and indirect ownership or control thereof;

2. Nature and character of activities engaged in by network from the date of its organization;

3. Name, number and location of all stations now or previously licensed to or affiliated in any manner with network with particular reference to the reasons for entering into or terminating any such affiliation and the basis upon which additional affiliations are entered into;

4. Nature of contracts, agreements or other arrangements between network and affiliates including reasons for various provisions of such contracts, agreements, or other arrangements, and history of the same;

[fol. 424] 5. Classification and grouping of stations connected with network as basic supplemental, etc., with reasons for same;

6. Financial arrangements between stations and affiliates, including basis for charges made by networks and affiliates;

7. The history and development of the network program policy, particularly with reference to standards which programs must meet, diversification, accommodation of program characteristics to the requirements of the area served, and program and advertising continuity;

8. Extent to which affiliates are required to conform to network program policy and extent to which affiliates control or influence policy;

9. History and development of operating policy and procedure with particular reference to contracts and agreements with wire companies for program transmission;

10. History and development of policy with respect to sale of time for advertising or other purposes, particularly with respect to standards applicable to products or services for which advertising is accepted;

11. Detailed information as to the hours which network controls over affiliated stations, the number of such hours actually used for network, commercial purposes over affiliated stations and the number of hours of network sustaining programs actually used by affiliates;

12. Rights of network and affiliates in event affiliate desires to substitute a local program for a network program.

13. History and development of agreements, contracts, or other arrangements between networks and advertisers, or other program sponsors, particularly and in detail agreements, contracts, or other arrangements with persons or organizations acting as agencies for the placing of broadcast advertising or the sale of time over the network.

14. History and development of policies with reference to the development of program talent and facilities or network organization devoted to that purpose;

15. Explanation and details of the organization, function, policies and practices of any agency directly or indirectly controlled by the network organization which retains and [fol. 425] procures talent for the purpose of selling such talent to the sponsors of commercial radio programs;

16. The nature of the service rendered by each station licensed to the network, particularly, with respect to the amount of program origination for network purposes at such stations and with respect to the nature of the local service rendered by such stations.

17. Name of any national advertising agency, user, or national representative of a station whose officers, directors, stockholders or proprietors hold any securities of the network organization, and the exact extent of such holdings;

18. Name of any national advertising agency, user, or national representative of a station, the securities of which are held by the network, its officers, directors, or proprietors;

19. Any relationship that may exist between the network and any national advertising agency, user, or national representative of a station through officers, directors, proprietors, employees, or security holders in common, and the exact nature and extent of such relationship;

20. Extent of program duplication in the primary and secondary service areas of stations carrying the network programs, particularly the percentage of population in the primary service area of each network station which may receive a network program as primary service from such station and from other network stations, the percentage of secondary service area of each network station which receives a network program as secondary service from such station and from other network stations, the number and extent of such duplications and amount of duplication required for adequate service areas shall be considered as defined in the Commission's proposed Rules and Regulations governing standard broadcast stations and Standards of Good Engineering Practices concerning the same.

On the same day, September 20, 1938, the Commission invited persons and organizations desiring to be heard to submit evidence through qualified and competent witnesses with respect to the matters covered by Order No. 37 and the 20 subjects set forth in the supplementary notice.

[fol. 426] Both the original Order and the supplementary notice related to conditions then existing or to the historical development of such conditions. Neither the Order nor the

supplementary notice called for any evidence of conditions prospectively.

From time to time statements were made during the public hearing in an effort to project into the future the operating experiences of the past but such statements were necessarily predicated upon the continuance of network broadcasting in a manner in which it was then and had theretofore been conducted.

At no time were such statements directed to any Rules or Regulations of the character promulgated by the Commission on May 2, 1941, nor could they have been because the earliest date upon which the Commission disclosed its intention to adopt specific Rules and Regulations was on November 28, 1940, about a year and a half after the public hearings were closed.

In opening the hearing on November 14, 1938 Chairman McNinch stated:

"In order to expedite the hearing as much as possible the networks, the transcription companies and those persons and organizations who have filed notices of appearances will be permitted to be represented by counsel in presenting direct testimony. *Cross-examination of witnesses generally will be by the Committee and by its staff.* Parties desiring to ask questions, should, if at all possible, hand the Commission's counsel such questions in writing. Departure from this procedure will be allowed only where the Committee shall decide that the ends of justice will be served thereby, upon request pointing out the interest of the party desiring cross-examination and the purpose and scope thereof. The Commission shall be furnished with fourteen copies of each exhibit offered in evidence.

"The purpose and object of this investigation is to develop facts for the information of the Commission and public concerning the matters included in Order No. 37. On the basis of the facts developed in the course of the investigation, *appropriate rules and regulations dealing with such matters will be promulgated by the Commission, and if such facts demonstrate the necessity therefor, legis-* [fol. 427] *lative recommendations made to the Congress by the Commission.*

"The Committee will not permit this hearing to be used as a sounding board for any person or organization. We are after facts and intend to get them. Only relevant opinions of those qualified to speak may be admitted for whatever light they may throw upon the problems involved in this investigation. I have emphasized that paragraph in order that none may miss it or misunderstand its purport or the intention of the Committee, that this is a factual inquiry and it will be held to that, plus the expression of expert opinion that is relevant to matters at issue." (Emphasis added.)

The evidence submitted by NBC was responsive to all those items which the Commission had set forth in its original Order and in the supplementary notice of September 20, 1938. It covered in detail such matters as the organization of NBC departments, the types of programs produced, the mechanics of distributing programs to affiliated stations, listener preference among the various program types, the coverage of the affiliated stations, the development and uses of electrical transcriptions, the organization and functions of the NBC International Division, Talent, music, scripts, labor relationships, studios and studio construction, relationships between NBC and its advertising clients, income, expenses and balance sheets. The public record even contains a description of certain research done expressly for the hearing with respect to station coverage.

After the conclusion of the public hearing and in response to Commission requests of September 5 and September 25, 1939, certain additional financial and program information was submitted by NBC. After the Oral Argument on December 2 and 3, 1940 additional information was submitted pursuant to a request of December 20, 1940 concerning the organization of NBC departments. As late as April 11, 1941 the Commission requested additional information with respect to taxes to which NBC replied on April 14, 1941. None of these subjects were covered directly by the Regulations promulgated by the Commission, though all are influenced by such Regulations.

Although it is true, as asserted by Mr. Telford Taylor in his affidavit of November 5, 1941, that NBC testimony fills 3,225 pages of the transcript of the public hearing the [fol. 428] only NBC testimony which related directly to the subject matter of the Commission's Regulations—i.e. station contracts—was that of Mr. William S. Hedges.

Hedges' complete testimony occupies 262 pages. The bulk of it concerns operations rather than contracts and none of it supports the Regulations adopted by the Commission.

To the Report of the Committee which heard the evidence dated June 12, 1940 there was attached a "Digest and Analysis of evidence presented in the Hearing on Commission Order No. 37, (Docket 5060) and of the Files of the Commission". At page 2 of that Digest it is stated:

"The record in this hearing is composed of 8,713 pages of testimony and 674 exhibits; there were 94 witnesses heard and the hearing consumed 73 days, extending over a period of six months.

"This report is based upon evidence from these sources and also from information otherwise in the records of the Commission." (Emphasis added.)

The earliest proposal for any specific rule was made by Mr. Louis G. Caldwell on behalf of Mutual Broadcasting System on April 19, 1939 and appears in Volume 70 of the transcript on pages 8454, *et seq.* This motion proposed merely an interlocutory regulation "worded somewhat as follows":

"No licensee of a standard broadcast station shall enter into a contract, agreement or other arrangement with any network organization covering or dealing with the affiliation of such licensee's station with the network organization or into any renewal or extension of their existing contract, agreement or other arrangement for a period extending beyond December 31, 1940."

This motion, which was repeated several times after the conclusion of the hearing, was not granted.

The report of the Committee, dated June 12, 1940, did not propose any regulations for adoption by the Commission.

No specific regulations had been proposed by the Commission when briefs were filed in November, 1940 upon the Committee Report.

Not until November 28, 1940, five days before the date set for oral argument, did the Commission indicate the type [fol 429] of regulations which it was considering for adoption and in its notice dated November 28, 1940 the Commission said:

"It is to be understood that the regulations have not received the approval of the Commission, and are to be taken as suggestions by the Commission intended to focus the attention of counsel upon the issues raised in the report. It should also be understood that counsel are not in any way limited to a discussion of these regulations but may address themselves to any of the issues of fact or policy raised by the Report of the Chain Broadcasting Committee."

On December 3, 1940, during the oral argument, Chairman Fly requested the parties to file supplementary briefs discussing the Commission's jurisdiction and the function of competition in broadcasting. These briefs were filed on January 2, 1941.

Between January 2, 1941 and May 2, 1941 there were no public proceedings. On May 2, 1941 the Commission formally promulgated Regulations 3.101 to 3.108, inclusive, which, as amended, are the subject of this action under Section 402 (a) of the Communications Act.

It thus clearly appears both from the terms of the original order itself, from the conduct of the proceedings thereafter, from the scope of the subject matter covered in the hearings, from the absence of any clearly defined issues and from the use of extra-record information by the Commission that the proceedings in Docket 5060 were legislative rather than judicial in character.

It also clearly appears that the evidence introduced at the public hearing in 1938 and 1939 could not have been directed toward establishing the effect upon network broadcasting of the regulations here in question since such regulations were not formulated, even in a preliminary form, until November 28, 1940 and were not promulgated in their present form until May 2, 1941. On the contrary, it clearly appears that the evidence introduced at the public hearing related to conditions as then existing in the industry.

Philip J. Hennessey, Jr.

Subscribed and sworn to before me this 10th day of December, 1941. Esther J. Jenkins, Notary Public, D. C. My Commission Expires: January 2, 1945. (Seal.)

[fol. 430]. IN DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AND ORDER GRANTING TEMPORARY SUSPENSION
OF COMMISSION'S ORDER

It is hereby stipulated by and between all the parties by
their respective counsel:

1. That counsel for all parties will cooperate to bring on
for hearing on or before December 15, 1941, the Motion for
Preliminary Injunction heretofore filed by plaintiffs and
the defendant's Motion to Dismiss the Complaint or, in the
alternative, for Summary Judgment.
2. Pending such hearing by this Court and the determi-
nation by it of plaintiffs' said Motion for Preliminary In-
junction, the defendant Federal Communications Commis-
sion is suspending, and will take no steps for enforcement
or application of, the Commission's Order of May 2, 1941,
in Docket No. 5060, at last amended October 11, 1941, with
respect to any failure by any radio station to comply with
such Order.
3. Any party hereto may move before the Court to modify
the terms of this stipulation to the same extent which such
party would be entitled to had this stipulation been in the
form of a temporary restraining order issued after hearing.

United States of America, by Samuel Brodsky, Spe-
cial Assistant to the Attorney General. Federal
Communications Commission, by Telford Taylor,
General Counsel. Thomas E. Harris, Assistant
General Counsel. National Broadcasting Com-
pany, Inc., by Wright, Gordon, Zachry, Parlin &
Cahill, by John T. Cahill. Woodmen of the World
Life Insurance Society, by Thomson, Wood & Hoff-
man, Attys., John B. Dawson. Stromberg Carlson
Telephone Manufacturing Company, by Hill, Riv-
kins & Middleton, by Thomas H. Middleton.

So ordered: 11/12/41.
Learned Hand, U. S. C. J. John Bright, U. S. D. J.
Henry W. Goddard, U. S. D. J.

[fol. 431] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AND ORDER GRANTING LEAVE TO INTERVENE

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto:

That the plaintiffs hereby consent to the appearance as of right in the above entitled proceedings of Mutual Broadcasting System, Inc. (which was a party in interest to the proceeding before the Federal Communications Commission entitled "In the Matter of the Investigation of Chain Broadcasting, Docket No. 5060"), pursuant to the provisions of Section 402 (a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C. A., Section 402 (a)) and of the Urgent Deficiencies Act (38 Stat. 219, 220; 28 U. S. C. A. Section 45 a), and that any party may enter an order upon this stipulation without notice to the others.

Dated New York, N. Y., December —, 1941.

Wright, Gordon, Zachry, Parlin & Cahill, Attorneys for National Broadcasting Company, Inc. Thomson, Wood & Hoffman, Attorneys for Woodmen of the World Life Insurance Society. Hill, Rivkins & Middleton, Attorneys for Stromberg Carlson Telephone Manufacturing Company. Samuel Brodsky, Special Assistant to the Attorney General for the United States of America, Telford Taylor, Thomas E. Harris, Attorneys for Federal Communications Commission. Leon Lauterstein, Attorneys for Mutual Broadcasting System, Inc.

So ordered, 12/29/41.

Learned Hand, U. S. Circuit Judge. John Bright,
U. S. D. J. Henry W. Goddard, U. S. D. J.

[fol. 432] IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and STORMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICA-
TIONS COMMISSION, Defendants

MUTUAL BROADCASTING SYSTEM, INC., Intervener

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant,

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROAD-
CASTING SYSTEM, INC., Interveners

Before: L. Hand, C. J., Goddard and Bright, D.JJ.

Upon motions before answer by the defendants under Rule 12 (b) (1) to dismiss for lack of jurisdiction the complainants in two actions brought under § 402 (a) of Title 47, U. S. Code, to enjoin and set aside certain regulations of the Federal Communications Commission.

John T. Cahill, for National Broadcasting Company. Charles E. Hughes, Jr., for the Columbia Broadcasting System. Telford Taylor and Thomas E. Harris, for the United States and the Commission. Louis G. Caldwell, for the Mutual Broadcasting System, Inc., Intervener.

OPINION :

L. HAND, C. J.:

These actions were brought to declare invalid and set aside certain regulations originally promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941; in their final form they appear at the end of this opinion. After the actions were filed the Commission, on October 31, 1941, promulgated a further regulation in the form of a "minute", also appearing at the end of the opinion. Preparatory to the issuance

of the regulations the Commission had held hearings at [fol. 433] which nearly 9,000 pages of testimony were taken; among others whom it had invited to attend, were the two plaintiff "networks", which accepted and took part by introducing extensive evidence. When the regulations appeared, the "networks" brought the two actions at bar under § 402 (a) of Title 47, U. S. Code, to set them aside as beyond the powers of the Commission and as arbitrary, unreasonable and without basis in the evidence. Upon the complaints so filed and voluminous affidavits they then moved for a preliminary injunction against their enforcement pendente lite. In the action brought by the National Broadcasting Company, two "affiliated stations" have joined as parties plaintiff and the United States and the Commission were originally joined as defendants; in the action brought by the Columbia Broadcasting System it alone is plaintiff and the United States is the only defendant, but the Commission later intervened. A third "network", the Mutual Broadcasting System, intervened as a defendant in both actions. The United States and the Commission have countered the plaintiffs' motion by motions, made before answer, to dismiss the complaints for lack of jurisdiction over the subject-matter under Rule 12 (b) (1), and for summary judgment under Rule 56 (b). The Mutual Broadcasting System has answered and joined in the motions of the other defendants. All these motions having come on before Judge Goddard, he assembled a court composed of three judges, to whom the hearing was transferred in accordance with the Act of October 22, 1913 (38 St. L. 219).

Since we are deciding that the District Court for the Southern District of New York has no jurisdiction over the subject-matter of the actions either as a court of three judges or of one, it will not be necessary to consider the merits; nevertheless we must say something about the background of the regulations in order to make our discussion intelligible. The business of broadcasting depends for its support principally, if not altogether, upon advertising. The broadcasting is done by "stations", each "station" selecting programs which it thinks will be popular, either spoken, sung or instrumentally performed in its own studio, or relayed to it by a "network" as will appear. Interjected among these programs, occur those fervid importuni-

ties of advertisers, upon the results of which the "station" must depend for its revenue. A single "station" dependent upon its own programs alone would be very expensive to [fol. 434] operate, and its income would be small; especially if, as has become customary, it were to add to its advertising programs what are called "sustaining programs", which are not paid for, but which are thought to give a general popularity to the "station". These circumstances have long since resulted in the creation of "networks" of the kind with which the actions at bar are concerned; that is to say, in a widespread system of contracts of a single company with separate "stations" scattered all over the Union and known as "affiliates". The plaintiffs, National Broadcasting Company and the Columbia Broadcasting System, are two such "networks"; they own and operate broadcasting "stations" of their own, but, although they depend in part upon these as outlets, their principal reliance is upon their "affiliates". They originate a great variety of programs—usually in a studio of one of their owned "stations"—which they transmit by telephone to the "affiliates" for broadcasting. The audience of such a "network" in this way becomes the aggregate of the audiences of its "affiliated stations", and this enables it to charge so much higher prices for advertising than the "affiliates" could charge alone, that both they and the "network" can divide the returns to their common advantage. There are four such national "networks", two owned by the National Broadcasting Company (one of which we are told it has disposed of since these actions were begun), another by the Columbia Broadcasting System, and the fourth by the Mutual Broadcasting System, which has intervened because it feels itself aggrieved by the practices against which the regulations in suit were directed.

Every broadcasting "station" must have a license and the Federal Communications Commission alone has power to grant, refuse, revoke, renew or modify licenses. The Commission also has "authority to make special regulations applicable to radio stations engaged in chain broadcasting." § 303 (i). By virtue of these powers it assumed to promulgate the regulations now challenged, all of which it will be observed, are no more than declarations of the conditions upon which the Commission will in the future issue licenses to "stations". The defendants' motions to dismiss the complaints are based upon the theory that these

regulations are not "orders" within the meaning of § 402 (a), and that therefore this court has no jurisdiction over [fol. 435] them; indeed, that they are not "orders" of any sort, but merely announcements of the course which it will pursue in the future, whenever an "affiliated station" applies for a new license, or for the renewal of an existing one. To this the "networks" reply that the regulations had an immediate effect; that they not only announced what would be the future practice of the Commission, but presently adjudicated the invalidity of the contracts between themselves and their "affiliates"; and that they have in fact already caused serious losses, because a number of "affiliates" have declared that they will be obliged to break their contracts when their licenses are renewed, and have thus made it impossible for the "networks" to accept large and valuable advertising contracts.

We do not think that we need commit ourselves generally as to what "orders" are reviewable under the Act of October 22, 1913 (38 St. L. 219), which § 402(a) of Title 47, U. S. Code, incorporates by reference as the measure of our jurisdiction. So far as we have found, the Supreme Court has never declared that that statute authorizes review of any decision of an administrative tribunal which neither directs anyone to do anything, nor finally adjudicates a fact to exist upon which some right or duty immediately depends. We agree that it is no answer that the decision challenged is "legislative" in character, (*The Chicago Junction Case*, 264 U. S. 258, 263), and, as we have just implied, it is enough if it authoritatively determines the existence of a fact that at once sets in execution some sanction, though the decision itself be not in form a command. *United States v. Baltimore & Ohio Railroad*, 293 U. S. 454; *Powell v. United States*, 300 U. S. 276; *Rochester Telephone Corporation v. United States*, 307 U. S. 125; *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 408. (*Colorado v. United States*, 271 U. S. 153; *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382; and *United States v. Idaho*, 298 U. S. 105, though they are of the same kind, are scarcely controlling, because they turned upon § 1(20) of the Interstate Commerce Act.) But decisions which are no more than announcements of future administrative action have never, so far as we can find, been treated as within this statute. That does not necessarily imply that a person presently injured

is without any remedy when the threatened action would be [fol. 436] unlawful; the situation then may present all the elements upon which equity will intervene in ordinary course. *Shields v. Utah Idaho Central Railroad Company*, 305 U. S. 177. It may be that the plaintiffs at bar could bring such actions in equity; at least it does not appear that recourse to them is positively forbidden, as was for example the case in *Venher v. Michigan Central*, 271 U. S. 127. But even so they would not be the actions at bar, which can be brought only under the statute, since otherwise the United States cannot be sued, or the Commission sued in this district, assuming that it was in any event possible to join it at all. Such actions would have to depend jurisdictionally upon the same facts as any other action against a public officer who threatens to do an unlawful act.

We should therefore have a great deal of doubt whether the regulations could in any view be regarded as "orders" which we could review under the Act of October 22, 1913 (38 St. L. 219), if the case came to us under the statute in vacuo. It does not, because, although, as we have said, § 402 (a) incorporates it by reference, those orders are excepted which are mentioned in the parenthesis: to wit, all orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license." Relief from such orders is provided in § 402 (b), (c), (d), (e) and (f); it is by appeal to the Court of Appeals of the District of Columbia, and it is to be heard upon the record made at the hearing of an application by the Commission. The procedure upon such appeals is in substance the same as that which has now become standard for the review of the decisions of administrative tribunals in adversary proceedings. Consequently, if any of the "affiliates" of the plaintiff "networks" should hereafter apply for a renewal of their licenses; and if, as we assume it will, the Commission adheres to its regulations, the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing. We have seen, however, that the regulations are nothing more than a declaration—or if one chooses, a threat—by the Commission that it will impose those conditions upon any renewal of a license in the future. No change is made in the

status of "affiliates" meanwhile; their existing contracts with the "networks" remain enforceable; nor has the Com-[fol. 437] mission given any evidence of an intention to use them as the basis for a revocation of existing licenses under § 312 (a). On the contrary, the "minute" we have mentioned commits it to a contrary course. Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission has power to impose the conditions mentioned in the regulations when a "station" applies for renewal; exactly the question which will determine the actual renewal of a license. The prescribed procedure will therefore be disregarded only because the putative wrong is merely threatened, instead of being in the very act of commission. Whatever may ordinarily be the proper scope of the word "order" in the Act of October 22, 1913 (38 St. L. 219), it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such "orders".

To this the plaintiffs make two answers. First, they say that the threat itself has already caused them loss, as we have said. Possibly that might support an action to compel the Commission to raise the issues immediately, as by a revocation proceeding under § 312 (a); even so, it should not substitute another court for the Commission and the Court of Appeals, certainly not this court in an action against the United States and the Commission. We need not decide the point, however, because the "minute" we have quoted offers equivalent relief without risk to any "station" which may challenge the regulations. Next, the plaintiffs say that they may not be able to raise the issue in a proceeding for the renewal of a license, because the "affiliated stations" may fear to incur the Commission's displeasure. As to the National Broadcasting Company this is plainly untrue because two of its "affiliates" have joined it as plaintiffs. As to the Columbia Broadcasting System, its complaint, read most favorably, does perhaps allege that none of its "affiliates" will challenge the regulations when their licenses expire; at any rate, to avoid any doubts, we shall so assume, little as that seems

likely to be the case. We may do so, because the issue is irrelevant anyway, for the plaintiff "networks" have an adequate remedy under § 402 itself. They allege—and [fol. 438] there seems to be no question about it—that their interest will be adversely affected by the enforcement of the regulations; if so, they can appeal to the Court of Appeals of the District from any order imposing unlawful conditions upon an "affiliate's" license. § 402 (b) (2). It is true that the section does not in terms provide that they shall also be heard in the proceeding before the Commission under § 309 (a) for the "renewal or modification of a station license;" but the Commission has itself answered that objection by § 1.102 of its regulations which permits intervention. An unreasonable refusal of the privilege so offered would appear to be a good objection on appeal under § 402 (b) (2); for it is not likely that the statute which grants an appeal to all interested parties, meant not to give them the opportunity to make a record on which they can succeed upon that appeal. At any rate until the Commission shows some disposition to deny them a fair hearing in a proceeding for renewal of an "affiliate's" license, we are not to assume that it will do so. And even if that should appear, the resulting right of action, if any, would not, as we have said, be in this court or against the United States. For the foregoing reasons the complaints will be dismissed for lack of jurisdiction over the subject-matter.

We do not understand that any findings of fact are proper under Rule 52(a), which provides for such findings only in "actions tried upon the facts without a jury." It is true that the plaintiffs have moved for a preliminary injunction, and that the rule also requires findings "in granting or refusing interlocutory injunctions;" but we are not "refusing" any injunction. Once the complaints are dismissed for lack of jurisdiction, the motions become moot and we shall not pass upon them at all. We are therefore entering judgment in each action without findings.

Complaints dismissed for lack of jurisdiction.

Learned Hand, Henry W. Goddard.

The Chain Broadcasting Regulations

Sec. 3.101. *Exclusive affiliation of station.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or im-

plied, with a network organization under which the station is prevented or hindered from, or penalized for broadcasting the programs of any other network organization.

[fol. 439] Sec. 3.102. *Territorial exclusivity*.—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Sec. 3.103. *Term of affiliation*.—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, expressed or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Sec. 3.104. *Option time*.—No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

Sec. 3.105. *Right to reject programs*.—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or im-

plied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing [fol. 440] network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

Sec. 3.106. *Network ownership of stations.*—No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

Sec. 3.107. *Dual network operation.*—No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

Sec. 3.108. *Control by network of station rates.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

The Minute of October 31, 1941

Procedure in Docket No. 5060

The Commission today adopted the following minute setting forth the procedure that it will follow in applying the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or [fol. 441] the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.

DISSENTING OPINION

BRIGHT, D. J.:

As I read the opinion of my brothers, they would dismiss for want of jurisdiction because nothing reviewable has been done, and that even after a license is denied, the only review thereof would be by appeal to the Court of Appeals in the District of Columbia.

By Section 402-a of the Communications Act of 1934, we have jurisdiction to enjoin, set aside, annul or suspend an order of the Commission, except where it grants or refuses an application for a construction permit, for the

granting, renewal or modification of a station license, or suspending a radio operator's license. These excepted matters can be reviewed only by appeal to the Court of [fol. 442] Appeals aforesaid. This order, in my opinion, does not come within any of the excepted provisions. No application has been or is here made for any such relief, and the order sought to be reviewed does not arise out of any such application.

There is no question in my mind that the order sought to be reviewed is one which, under the terms of Section 402-a, we have jurisdiction to enjoin. It is designated by the defendants as a "commission order". It has the usual mandatory clauses found in orders. It was by its terms obviously entered after an investigation made upon the Commission's own motion to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity. It promulgates certain regulations, an obvious and attempted exercise of the Commission's rule-making power. It is clearly an attempt to make rules because at the time there was nothing else before the Commission upon which it could or did act. All of these rules, or regulations as they are called in the order, relate only to standard broadcasting stations having contracts with a network organization, except rule 3.106, which relates to a license to be granted to a network organization having more than one station in a service area, and rule 3.107 which proscribes a broadcasting station affiliated with a network maintaining more than one network. These rules do not apply to stations not affiliated with any network. They apply only to contractual relations with networks, and in addition, prohibit the ownership by a network of more than one station in a specified service area and the ownership by any organization of more than one network. The order fixes as immediately the time when it shall become effective. In other respects it has all the earmarks of a final order.

That it was intended to be final is further evidenced by the Commission's report. It finds that the public interest "requires" the application of the regulations to stations affiliated with regional as well as with national networks. It affirms its powers to do so under Section 303-(i) of the Communications Act, and clearly reveals that it is exercising its rule-making power when it queries whether the

Commission can formulate into "general rules and regulations" the principles which it *intends* to apply in passing on individual applications. That its action is final is further [fol. 443] emphasized by the statement, "We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice. * * * The regulations we are now adopting are nothing more than the expression of the general policy *we will apply* in exercising our licensing power. The formulation of a regulation in general terms is an important aid to *consistency and predictability* and does not prejudice any rights of the applicant."

That it is exercising this rule-making power is further emphasized by another statement in its report, that Section 303-(i) gives the Commission specific power to make special regulations applying to radio stations engaged in chain broadcasting and that "no language could more clearly cover *what we are doing here.*"

What it has done emphasizes more the finality of its order, which is an affirmative direction that thereafter no standard broadcasting station shall contract in terms prohibited, and ultimately puts an end to service by networks under contracts now existing. In fact, I think that the regulations are intended to effect existing contracts for the effective date of the order is deferred until November 15th, 1941, "with respect to existing contracts, arrangements or understandings". This certainly is not a statement that the regulations shall not apply to existing contracts; it is merely a postponement as to when the axe will fall.

The particular agreements prohibited are presently contained in most of the affiliation contracts of the two complaining networks. They state those provisions are essential to the proper and successful conduct of their business, and in deciding the question of jurisdiction, I believe we must assume this to be true. It is also shown by them, without contradiction, that between the time the regulations were promulgated and the commencement of these actions, not less than twenty-four broadcasting stations having affiliation contracts with N.B.C. have cancelled their contracts as a result of the order in question, and not less than twenty-four others having such contracts, have served notice that they do not intend to abide by the terms of such contracts unless they are conformed to the Commission's order. Similarly, it is shown by the affidavits sub-

mitted by C.B.S. that some of the stations affiliated with it are refusing to renew their affiliation contracts, some are [fol. 444] threatening to cancel or repudiate them, and some have already cancelled on the ground that the rules in question prohibit them. There is thus a present injury.

It is suggested that the plaintiffs must wait until the Commission has ruled upon the application of a broadcasting station for a renewal of its license. Can it be said that the Commission will change its rules, in view of the positive statement it has already made with reference thereto and above quoted? Must these networks await the idle ceremony of a denial of a license before any relief can be sought when it is perfectly obvious that no relief will be given? And what relief could they get if they did wait? The networks are not to be licensed, only the individual stations who make application. But it is said the net works could intervene and be heard. All that might be said or urged in their behalf has doubtless been communicated to the Commission in the three years between March 18, 1938, and May 2, 1941, when the investigation was going on. Must they march up the hill and down again, with the probability of being met with the statement that the Commission has given the matter due consideration and has done what it intends to abide by, as it has definitely said in its report? It is said, however, that by a minute adopted after these actions were brought, the Commission has manifested its intention to permit the net works to intervene and be heard upon the subject of the granting or denial of the license. That minute refers obviously only to a station, and insofar as it attempts to change the nature of the order sought to be reviewed or to obviate a review would be abortive. *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433-452. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498-515.

This court has reviewed the rule-making power of this very Commission without being troubled by the question of jurisdiction. *A. T. & T. Co. v. U. S.*, 14 F. Supp. 121, affirmed 299 U. S. 232. That there can be a review of an order exercising the delegated legislative function of rate-making and rule-making is admitted in *U. S. v. Los Angeles R. R.*, 273 U. S. 299, 309. In *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, where bills were filed to enjoin orders prescribing methods of account, book-

keeping and reports, jurisdiction was not questioned in a court always jealous of its jurisdiction. In *Kansas City* [fol. 445] *Southern Railway v. U. S.*, 231 U. S. 423, jurisdiction was again assumed of a petition to declare invalid and to enjoin regulations relative to accounting. In *Skinner & Eddy Corp. v. U. S.*, 249 U. S. 557-562, which involved a refusal of a suspension of a tariff, jurisdiction was assailed, at least until after a further remedy was sought; and it was there stated that where contention was made that the Commission had exceeded its statutory powers, courts have jurisdiction of suits to enjoin even if the plaintiff had not attempted to secure redress before the Commission. In the *Assigned Car Cases*, 274 U. S. 564, suits were brought to enjoin and annul an order which prescribed a rule governing the distribution of cars among coal mines after an investigation by the Interstate Commerce Commission of its own motion, and no question of right of review was raised. And in *A. F. of L. v. Labor Board*, 308 U. S. 401, 408, it was admitted that administrative determinations which are not commands may for all practical purposes, determine rights as effectively as the judgment of a court and may be re-examined by courts under particular statutes providing for the review of orders. In *Pierce v. Society of Sisters*, 268 U. S. 510, suit was brought by a private school to restrain the enforcement of an Oregon statute which required primary education in public schools, and jurisdiction was sustained, Mr. Justice McReynolds writing that the suits were not premature, that the injury to the plaintiffs was present and very real and not a mere possibility in the remote future.

Dated: February 20, 1942.

(S.) John Bright, U. S. D. J.

[fol. 446] DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY, and STROMBERG CARLSON
TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

THE UNITED STATES OF AMERICA and THE FEDERAL COM-
MUNICATIONS COMMISSION, Defendants

MUTUAL BROADCASTING SYSTEM, INC., Intervener

ORDER DISMISSING COMPLAINT—Filed February 21, 1942

Before: L. Hand, C. J., and Goddard and Bright, D.JJ.

This cause came on to be heard at the January, 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof it is

Ordered, adjudged and decreed that the complaint herein be, and the same hereby is, dismissed because the court has no jurisdiction over the subject-matter of the action.

Learned Hand, Circuit Judge; Henry W. Goddard,

District Judge; — — — District Judge.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIS-
TRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION

Sirs:

Please take notice that the undersigned will bring the annexed motion on for hearing before this Court at Room No. 110, United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 27th day of February, 1942 at 3:00 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a member of the firm, Attorneys for Nat-

[fol. 447] tional Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York. Thomson, Wood and Hoffman, by John B. Dawson, a member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York. Hill, Rivkins and Middleton, by Thomas H. Middleton, a member of the firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York.

To:

Samuel Brodsky, Esq., Special Assistant to the Attorney General, Attorney for the United States of America, United States Court House, Foley Square, New York, N. Y.

Telford Taylor, Esq., General Counsel, Federal Communications Commission, Washington, D. C.

Leon Lauterstein, Esq., Attorney for Mutual Broadcasting System, Inc., 15 William Street, New York, N. Y.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER

Upon the complaint and all the affidavits and other papers filed, and all the proceedings heretofore had, herein, the plaintiffs move this Court for an order suspending and restraining the operation, enforcement or execution of the order of the Federal Communications Commission in Docket No. 5060 made May 2, 1941, as amended October 11, 1941 (in so far as the order purports to become effective on or before November 15, 1941), pending the hearing and determination of an appeal to be taken by the plaintiffs to the Supreme Court of the United States from the order or decree of this Court entered February 21, 1942, dismissing the complaint herein on the ground that this Court has no [fol. 448] jurisdiction over the subject matter of this ac-

tion; and for such other and further relief as to the Court may seem just.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a member of the firm, Attorneys for National Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York.

Thomson & Wood and Hoffman, by John B. Dawson, a member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York.

Hill, Rivkins and Middleton, by Thomas H. Middleton, a member of the firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York.

Goodwin, Nixon, Hargrave, Middleton & Devans, Office and P. O. Address, 31 Exchange Street, Rochester, N. Y., of Counsel for Stromberg Carlson Telephone Manufacturing Company.

[fol. 449] IN UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICA-
TIONS COMMISSION, Defendants

MUTUAL BROADCASTING SYSTEM, INC., Intervenor

Civil Action No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant,

THE FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL
BROADCASTING COMPANY, INC., Intervenor

Before L. Hand, C. J.; Goddard and Bright, D. J. J.,

OPINION

PER CURIAM:

The Commission is of course right in saying that we have decided that the plaintiffs have adequate protection outside of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. If so, the plaintiffs will not be adequately protected, and indeed they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined in a renewal proceeding. Considering on the one hand that if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage, and on the other that the Commission itself gave no evi-

dence before these actions were commenced that the proposed changes were of such immediately pressing importance that a further delay of two months will be a serious injury to the public, it seems to us that we should use our discretion in the plaintiffs' favor to stay enforcement of the regulations until they can argue their appeal. For these reasons we will grant such a stay until the argument of the appeal before the Supreme Court or the first day of [fol. 450] May, 1942, whichever comes first. For any further stay the plaintiffs must apply to the Supreme Court itself, or to the Circuit Justice.

Learned Hand, U. S. C. J., Henry W. Goddard, U. S. D. J., John Bright, U. S. D. J.

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

FINDINGS OF FACT

I. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court—contrary to its said judgment—has in fact jurisdiction over the cause of action stated in the complaint; the plaintiffs will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiffs arising from its enforcement, if the conditions mentioned in the First Finding exist.

CONCLUSION OF LAW

That the plaintiffs are entitled to a stay pending their appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of May, 1942, whichever is earlier.

Learned Hand, U. S. C. J., Henry W. Goddard, U. S. D. J., John Bright, U. S. D. J.

[fols. 451-464] IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DECREE GRANTING TEMPORARY RESTRAINING ORDER

This cause came on to be further heard at the February, 1942, term of this Court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the status quo pending an appeal by the plaintiffs to the Supreme Court, for the reasons appearing in the Opinion, and Findings of Fact and Conclusion of Law, filed herewith, it is

Ordered, Adjudged and Decreed that until May first, 1942 or the argument of the appeal herein to the Supreme Court of the United States, whichever is earlier, the Federal Communications Commission be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1942, and which are known as "Order in Docket No. 5060."

Learned Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

[fol. 465] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941.

No. 1025

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY, Appellants,

VS.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS
COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.

Appeal from the District Court of the United States for the
Southern District of New York.

[June 1, 1942.]

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a companion case to No. 1026, *Columbia Broadcasting System, Inc. v. United States*, decided this day. Both present substantially similar facts and the same issues of law.

Appellant, National Broadcasting Company, maintains two radio broadcasting systems, the "blue network" and the "red network". The two other appellants operate radio broadcasting stations licensed by the Communications Commission, and have entered into contracts with National similar to those involved in the *Columbia* case and to those of other stations which participate in National's networks.

[fol. 466] Appellants brought the present suit in the Southern District of New York to set aside the order of the Commission of May 2, 1941, as amended by its order of October 11, 1941, promulgating the Chain Broadcasting Regulations which we considered in the *Columbia* case, on the grounds that the order is beyond the Commission's statutory authority or, if within it, that the statute is an unconstitutional delegation of the legislative power of Congress in violation of Article I, § 1 of the Constitution, and operates to deprive appellants of property without the due process of law guaranteed by the Fifth Amendment.

The district court of three judges dismissed the complaint, — F. Supp. —, holding that the Commission's order

is not reviewable under the provisions of § 402(a) of the Communications Act of 1934, 48 Stat. 1093, 47 U. S. C. § 402(a), and the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. § 47, but stayed the operation of the order pending direct appeal to this Court.

According to the allegations of the bill of complaint, National conducts its broadcasting business in substantially the same manner as Columbia. It establishes telephone wire connections with licensed broadcasting stations with which it enters into contracts for limited periods for chain broadcasting of its radio programs. These contracts do not require that the station shall broadcast the programs of no other chain than National. But a feature of them is the option given to National for use of the station on 28 days' notice for certain specified periods of radio time in broadcasting commercial network programs provided by National. It is alleged that because of the contract provisions the regulations will require the stations affiliated with National to abandon their contracts or lose their licenses either by the Commission's cancellation of or refusal to renew them. The bill of complaint makes a sufficient showing of irreparable injury to National, including an allegation that forty-eight affiliated stations have served notice of abrogation of the contracts.

[fol. 467]° For the reasons stated at length in the opinion in the *Columbia* case, we hold that the order of the Commission is reviewable in the present suit by the district court of three judges. The bill of complaint states a cause of action in equity. The judgment will accordingly be reversed and the cause remanded for further proceedings.

Unlike the *Columbia* case, the record discloses no facts showing what effect the Commission's minute adopted after the present suit was brought has had or will have upon the cancellation of appellants' contracts by the affiliated stations. So far as relevant that will be a matter for consideration by the court below, as will be the question, not considered here, whether the appellants other than National are proper parties plaintiff.

As in the *Columbia* case the stay now in effect will be continued, on terms to be settled by the court below.

Reversed.

Mr. Justice Black took no part in the consideration or decision of this case.

Mr. Justice Reed, Mr. Justice Frankfurter and Mr. Justice Douglas dissent for the reasons set forth in the dissenting opinion in No. 1026.

[fol. 468] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 1026

COLUMBIA BROADCASTING SYSTEM, INC., Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.

Appeal from the District Court of the United States for the Southern District of New York

[June 1, 1942]

Mr. Chief Justice STONE delivered the opinion of the Court:

The Federal Communications Commission, by its order of May 2, 1941, as amended by its order of October 11, 1941, promulgated regulations which purport to require the Commission to refuse to grant a license to any broadcasting station which enters into certain defined types of contract with any broadcasting network organization. These regulations, it is alleged, affect adversely appellant's contractual relations with broadcasting stations and impair its ability to carry on its business in maintaining and operating its nationwide broadcasting network. The regulations as amended on October 11, 1941, together with a supplemental "minute" promulgated by the Commission on October 31, 1941, are set forth at the end of this opinion. The question for our decision is whether appellant is entitled to secure a judicial review of the order by a suit brought under § 402(a) of the Communications Act of 1934, 48 Stat. 1063, 47 U. S. C. § 402(a), and the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. § 47.

[fol. 469] Pursuant to § 402(a) appellant brought the present suit against the United States in the Southern District of New York, to enjoin enforcement of the Commission's

order as contrary to the public interest and beyond the Commission's statutory authority, and on the further ground, if the order be deemed within that authority, that the statute is an unconstitutional delegation of legislative power by Congress in violation of Article I, § 1 of the Constitution, and operates to deprive appellant of property without due process of law in violation of the Fifth Amendment. The case was heard by a court of three judges, which permitted the Commission and the Mutual Broadcasting Company to intervene as defendants. It granted appellees' motion to dismiss the complaint for want of jurisdiction, — F. Supp. —, and stayed the operation of the Commission's order pending direct appeal to this Court.

In 1938 the Communications Commission authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity". Extensive hearings were held by a committee consisting of three members of the Commission, at whose request the national networks, including appellant, intervened. In June, 1940, the committee made a report, on the basis of which briefs were filed and oral argument was presented before the full Commission by the three national networks and other interested parties. In May, 1941, the Commission issued its "Report on Chain Broadcasting" and ordered the adoption of the regulations which in their amended form, are the subject of the present controversy.

The relevant facts stated in the bill of complaint are as follows: Appellant or its predecessor has been engaged in the business of nationwide network or chain broadcasting since 1927. It has a large amount of physical property used in the business and has built up a valuable goodwill. For its broadcasts it maintains a staff of employees and expends large amounts for musicians and broadcasting performers. [fol. 470] It has commitments by long-term contracts aggregating more than \$4,000,000 for broadcasting expenditures, including those for the use of land and buildings and for the furnishing of news and broadcasting programs in the next few years. Appellant's total property devoted to its broadcasting business exceeds \$18,000,000 in value; its earnings from the network exceeded \$3,000,000 in both 1939 and 1940.

Chain broadcasting is the means by which radio programs are made available to all or a large part of the nationwide radio audience. It is defined by the Communications

Act, 47 U. S. C. § 153(p), as the "simultaneous broadcasting of an identical program by two or more connected stations". The chain broadcaster prepares radio programs, for which it engages performers in advance, and simultaneously broadcasts them over a large number of radio stations to which the programs are transmitted from some central point of origination by wire telephone lines leased by the broadcaster, here the appellant. The programs, which are prepared well in advance of the broadcast and given by persons employed for the purpose by appellant, are of two classes—commercial programs sponsored and paid for by advertisers, and sustaining programs furnished by appellant and not paid for by any advertiser.

Appellant's network comprises 123 stations in 122 cities in the United States. It is so operated as to enable ninety per cent of the radio audience of the United States to listen simultaneously to programs provided by appellant and broadcasted over these stations. Appellant owns and operates seven of the stations and leases an eighth, all licensed by the Commission. With the remaining 115 stations it enters into individual contracts usually for periods of five years, terminable in some instances by appellant on twelve months' notice. By these contracts appellant undertakes to furnish each station with an average of at least sixty hours per week of network sustaining and sponsored programs. The sustaining programs are furnished without charge, the station being free to use them or not as it [fol. 471] chooses. Appellant undertakes to furnish the station with all commercial programs which the sponsor requests the station to broadcast and to pay the station a specified hourly rate for the use of its facilities in broadcasting such programs. Appellant agrees not to furnish its programs to other stations in the same city; the affiliated station, with exceptions not now material, agrees not to broadcast the program of any other network. Of critical importance in the present litigation is the stipulation of the affiliated station that it will, upon not less than twenty-eight days' notice from appellant, broadcast the sponsored or commercial program furnished to it by appellant for at least fifty "converted" hours (averaging seventy-nine regular clock hours) per week.

These provisions of appellant's contracts are alleged to be indispensable to the maintenance and efficient operation of its network and to the existence of a strong and efficient

network broadcasting system, and necessary to enable appellant to compete with other advertising media. On May 2, 1941 the Commission issued its order which, as amended by its order of October 11, 1941, promulgated the "Chain Broadcasting Regulations" of which appellant complains, and which the Commission characterized in its Report as "the expression of the general policy we will follow in exercising our licensing power".¹ The regulations provide that no license shall be granted to a broadcast station having contracts with a network organization, containing any [fol. 472] of several provisions which are characteristic of appellant's contracts with its affiliates. These include provisions by which the station is prevented from broadcasting the programs of any other network organization (3.101); or which prevent another station serving substantially the same area from broadcasting the network programs not taken by the station applying for license, or prevent another station serving a substantially different area from broadcasting any program of the network organization (3.102); or by which the station contracts for affiliation with the network for a period longer than two years (3.103); or by which the station "options for network programs any time subject to call on less than 56 days' notice or more time than a total of three hours" within each of four specified segments of the broadcast day, the

¹ The Commission in its Report says, p. 85:

"We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice.

"Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant. Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient information is available upon which they may be based."

regulation declaring "such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations" (3.104); or which prevent the station (a) from rejecting network programs which the station reasonably believes to be unsatisfactory or unsuitable or (b) from substituting for the network program a program of outstanding local or national importance (3.105).

After making its order of May 2, 1941, the Commission deferred its effective date until further order. By its order of October 11, 1941, the Commission fixed the effective date as November 15, 1941, and directed "that the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties", and "that the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

[fol. 473] The bill of complaint also alleges that the purpose and effect of the regulations are to prohibit station licensees from having agreements of the kind which appellant has with its affiliates; that prior to the order of May 2, 1941, it was the practice of the Commission to renew the licenses of stations annually and that the licensed stations have had a reasonable expectancy of the annual renewal of their licenses; that 115 licensed stations have such contracts with appellant expiring at various times between the original effective date of the regulations and December 31, 1947. It is alleged that when their current licenses expire, at the latest, and perhaps earlier through the revocation of existing licenses, such stations face the loss of their licenses if they perform or continue in force or renew any existing contracts containing the described provisions.

The bill alleges that since the stations fear the loss of their licenses, as a result of the regulations, they will not negotiate for or renew affiliation contracts containing such provisions. And because they fear the loss of their licenses

the stations have threatened to cancel and repudiate their affiliation contracts, and many have notified appellant that they will not be bound by their contracts after the regulations become effective. As a consequence appellant's ability to conduct its business and maintain its public broadcasting service is seriously impaired and the regulations will make the operation of appellant's business more costly, reduce its earnings and render its property and business less valuable.

The bill of complaint was filed October 30, 1941. The following day the Commission promulgated a supplemental "minute" setting up a procedure by which the validity of the regulations might be tested upon application for a license by an individual licensee. The minute declared that if a station wished to challenge the regulations the Commission would grant a temporary extension of its license until there had been a final court determination of the issues. In the event of such litigation, and if the validity of the regulations were sustained, "the Commission will [fol. 474] nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision".

An affidavit subsequently submitted by appellant in support of its motion for a temporary injunction states that since the Commission's minute of October 31st, appellant has continued to receive indications that its affiliates will cancel and repudiate their contracts and refuse to renew them, and has received no indication that the minute has or will have the effect of inducing stations to assume the burden of testing the validity of the regulations. Attached to the affidavit are letters from five affiliates, written after October 31st, indicating their intention not to be bound by the contracts. The affidavit also states appellant's belief that it would have received more such letters had it not been for its circulation of information concerning the pendency of this suit.

Accepting the allegations of the complaint as true, as for present purposes we must, it is evident that application by the Commission of its regulations in accordance with their terms would disrupt appellant's broadcasting system and seriously disorganize its business. As the bill alleges, station licenses have been renewable by the Commission annu-

ally,¹ whereas appellant's contracts are for five year periods and many of them will survive the expiration of the existing licenses to the affiliated stations. Under Regulations 3.101, 3.102, 3.103, and 3.104, each affiliate must repudiate his contract or be denied the renewal of his license. In either case this would deprive appellant of the station's participation in its network, for which its contracts call.

Regulation 3.104 not only requires all options by appellant to be exercised on 56 days' rather than 28 days' notice as at present, but provides that no option time is exclusive of other networks, and thus allows to appellant no option time within which it can command the use of affiliated stations for any program for broadcasting on a national scale. [fol. 475] These sections together thus operate to break down the network enterprise in which appellant and its affiliates are by their contracts cooperating, and to substitute a system in which every station is available to every network on a "first come first served basis".

The Commission concedes by its brief that as provided by § 312(a) "Any station license may be revoked . . . because of conditions revealed by such statements of fact as may be required [of a licensee] from time to time which would warrant the Commission in refusing to grant a license on an original application". Consequently the regulations by their terms, read in conjunction with § 312(a), expose licensees, who renew their affiliation contracts, to revocation proceedings by the Commission whenever upon a statement which the Commission may require it appears that the licensee has entered into an affiliation contract which the regulations proscribe.

A proceeding to set aside an order of the Commission under § 402(a) and the Urgent Deficiencies Act is a plenary suit in equity. Hence the questions raised by the motion to dismiss are whether the Commission's order is an "order", review of which is authorized by § 402(a) of the Act, and if so whether the bill states a cause of action in equity. The suit cannot be maintained unless both questions are answered in the affirmative.

Section 402(a) makes applicable the provisions of the Urgent Deficiencies Act to "suits to enforce, enjoin, set

¹ On October 11, 1941, the Commission amended Regulation 3.34 to make the normal license period two years.

aside, annul, or suspend any order of the Commission" except orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license". Review of the orders excepted from § 402(a) is by appeal to the Court of Appeals of the District of Columbia under the provisions of § 402(b). See *Scripps-Howard Radio, Inc. v. Federal Communications Comm'n*, 315 U. S. —. Since the [fol. 476] Commission's order neither grants, denies nor modifies any license, any review in advance or independently of an application for a station license must be under § 402(a), and then only if the Commission's order promulgating the regulations is an "order" within the meaning of this section. The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive. *Powell v. United States*, 300 U. S. 276, 284-85; *A. F. of L. v. Labor Board*, 308 U. S. 401, 408.

The Commission's investigation of the contractual relations between the networks and the stations, which resulted in the order now under attack, was for the stated purpose of prescribing regulations of such relationships. The order authorizing the investigation recited that the proceeding was taken under § 303(i) of the Act, which gives the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting". Since the Commission is not in terms given authority to regulate contractual relations between the stations and the networks, regulation of them could be accomplished only by regulating licensed radio stations which participate in chain broadcasting. It was by regulations in terms applicable to such stations that the Commission sought to control their contractual relationships with the networks.

The order is thus in its genesis and on its face, and in its practical operation, an order promulgating regulations which operate to control such contractual relationships, and it was adopted by the Commission in the avowed exercise of its rule-making power. Such regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commis-

sion, have the force of law and are orders reviewable under the Urgent Deficiencies Act. *Assigned Car Cases*, 274 U. S. 564; *United States v. B. & O. R. Co.*, 293 U. S. 454. And regulations of like character, by which the Communications [fol. 477] Commission has prescribed generally the records and accounts to be kept by telephone companies subject to its jurisdiction, are similarly reviewable under § 402(a). *A. T. & T. Co. v. United States*, 299 U. S. 232.

The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. If the applicant for a license has entered into an affiliation contract, the regulations require the Commission to reject his application. If a licensee renews his contract, the regulations, with the sanction of § 312(a), authorize the Commission to cancel his license. In a proceeding for revocation or cancellation of a license, the decisive question is whether the station, by entering into a contract, has forfeited its right to a license as the regulations prescribe. It is the signing of the contract which, by virtue of the regulations alone, has legal consequences to the stations and to appellant. The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract. If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will enforce the penalty incurred under its regulations for non-compliance. *Assigned Car Cases*, *supra*; *A. T. & T. Co. v. United States*, *supra*.

The regulations are rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more. If the regulations are valid they alter the status of appellant's contracts and thus determine their validity in advance of such proceedings. By striking them down by a determination proclaimed in advance that licenses shall be cancelled or refused because of a previous failure to comply with the regulations, they impose a penalty and sanction for noncompliance far more drastic than the fines customarily inflicted for breach of reviewable administrative orders.

[fol. 478] Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. And in this case it is alleged without contradiction that numerous affiliated stations have conformed to the regulations to avoid loss of their licenses with consequent injury to appellant.

Such regulations have the force of law before their sanctions are invoked as well as after. When as here they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a) and the Urgent Deficiencies Act. *A. T. & T. Co. v. United States*, *supra*; *Rochester Tel. Corp. v. United States*, 307 U. S. 125; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194; *Kansas City So. Ry. v. United States*, 231 U. S. 423; *Assigned Car Cases*, *supra*; *Chicago R. I. & P. Ry. Co. v. United States*, 284 U. S. 80; *United States v. B. & O. R. Co.*, *supra*.

It is no answer to say that the regulations are addressed only to the Commission and merely prohibit it from granting—and authorize it to cancel—licenses in the case of all stations entering into such contracts, and that accordingly all stations are left free to enter into contracts or not as they choose. They are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts. Failure to comply with [fol. 479] the regulations entails such consequences to the station owner and to appellant. These are the loss of the affiliated stations' licenses if they adhere to their contracts, and disruption of appellant's network through the declared unlawfulness of the contracts, if the regulations are valid.

The purposes sought to be accomplished by § 402(a) and the Urgent Deficiencies Act would be defeated if a

suitors were unable to resort to them to avoid reasonably anticipated irreparable injury resulting from such legal consequences of the Commission's order, merely because the Commission as yet has neither refused to renew a license, as the regulations require, nor cancelled a license, as the regulations permit. Such an argument addressed to the form rather than the substance of the order was rejected in *Powell v. United States*, *supra*; cf. *A. F. of L. v. Labor Board*, *supra*, 408. The *Powell* case likewise repudiates the suggestion that merely because the order is not in terms addressed to those whose rights are affected, they cannot seek its review. See also *Western Pacific v. South. Pac. Co.*, 284 U. S. 47; *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382.

The order here is not one, as the Government argues and as the court below seemed to think, where the complainant's rights are affected only on the contingency of future administrative action as in *United States v. Los Angeles R. R.*, 273 U. S. 299; cf. *Rochester Telephone Corp. v. United States*, *supra*, 130. As the Court declared in the *Los Angeles* case, 309, 310, reviewable orders are "an exercise either of the quasi-judicial function of determining controversies or of the delegated function of rate making and rule making". And the Court pointed out that the "so-called order" in that case did not "determine any right or obligation" or change the plaintiff's "existing or future status or condition", and that it was "merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission" and "is the exercise solely of the function of investigation."

[fol. 480] Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead they operate to control such action and to determine in advance the rights of others affected by it. The Commission gave its own recognition that such is their operation by its successive postponements of the effective date of the order for a period now expired, and by its suspension of Regulations 3.106 and 3.107, in order to enable the networks to dispose of their properties.

Of course the Commission was at liberty to follow a wholly different procedure. Instead of proclaiming general regulations applicable to all licenses, in advance of any specific contest over a license, it might have awaited such a contest to declare that the policy which these regulations embody represents its concept of the public interest. As a matter of sound administrative practice, both the rule-making proceeding and the specific license proceeding undoubtedly have much to commend them. But they are by no means the same, nor do they necessarily give rise to the same kind of judicial review. Having adopted this order under its rule-making power, the Commission cannot insist that the appellant be relegated to that judicial review which would be exclusive if the rule-making power had never been exercised and consequently had never subjected appellant to the threatened irreparable injury.

The court below assumed that if appellant had any equitable cause of action, it must be prosecuted in an ordinary suit and not under the provisions of the Urgent Deficiencies Act. But we think this mistakes both the nature of the regulations and the purpose of suits under that Act, as incorporated in § 402(a). Such a cause of action obviously can arise only because of the operation of the regulations. The regulations are the effective implement by which the [fol. 481] injury complained of is wrought, and hence must be the object of the attack. It is because they are an exercise of the rule-making power, and because they presently determine rights on the basis of which the Commission is required to withhold licenses and authorized to cancel them, that there is an order within the meaning of § 402(a) and the Urgent Deficiencies Act.

The Commission argues that since its Report characterized the regulations as announcements of policy, the order promulgating them is no more subject to review than a press release similarly announcing its policy. Undoubtedly regulations adopted in the exercise of the administrative rule-making power, like laws enacted by legislatures, embody announcements of policy. But they may be something more. When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one "which we will follow in exercising our licensing power", they must be taken by

those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them. The Commission's contention that the regulations are no more reviewable than a press release is hardly reconcilable with its own recognition that the regulations afford legal basis for cancellation of the license of a station if it renews its contract with appellant.

Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause [fol. 482] to be revoked. *Chicago Junction Case*, 264 U. S. 258, 266-68; *Western Pacific v. South. Pac. Co.*, *supra*; *Clai-borne-Annapolis Ferry Co. v. United States*, *supra*; compare, in the case of an attack upon the validity of a statute, *Truax v. Raich*, 239 U. S. 33, 38-39; *Pierce v. Society of Sisters*, 268 U. S. 510.

What we have said of the allegations of the complaint, and of the effect of the Commission's order if those allegations are sustained upon the trial, is enough to establish the threat of irreparable injury to appellant's business and to show also that the injury can not be avoided, as the Commission suggests, by appellant's intervention in proceedings upon applications for renewal of licenses by its affiliates or in proceedings to cancel their licenses, if and when such proceedings are instituted. Appellant has sufficiently alleged that the affiliates are cancelling or threatening to cancel their contracts in order to conform to the regulations. It is to avoid the irreparable injury which would result from such wholesale cancellations of its contracts, induced by the force of the regulations, that appellant makes its attack on them now rather than in later proceedings on the individual applications for licenses in those cases, if any, in which the stations are willing to seek licenses without complying with the prerequisites laid down by the regulations.

The issues in such a proceeding are not necessarily the same as the issues here. Intervention in it would afford appellant no assurance either of an adjudication of appellant's contentions or that the action of other stations would be governed by it. Moreover, if the Commission's order is as we hold a reviewable order, appellant is free to seek review under § 402(a). It is not thereby, as the court below seemed to think, improperly substituting a different procedure and court for that which Congress has prescribed for the trial of like issues so far as they may be raised on review of an order denying a license. Such issues may likewise be involved in a proceeding, upon the Commission's own motion, for modification or cancellation of a license, which concededly is reviewable under § 402(a). See *Scripps-Howard* [fol. 483] *Radio, Inc., v. Federal Communications Commission*, *supra*. But review of the order by a licensee in such a proceeding affords no adequate remedy. If ever instituted, which is uncertain, it would come too late to save appellant from the injury wrought by the outlawry of its contracts.

Nor does the Commission's minute, filed after the present suit was brought, afford an adequate basis for requiring appellant to seek relief by intervention in a proceeding on application for a license reviewable under § 402(b). In that event the minute would not operate to broaden the issues involved in the renewal application. Nor would it afford a basis for restraining enforcement of the regulations as to other affiliated stations, pending adjudication of the validity of the regulations. Without full exploration of the subject, such as can be had only at the trial, we cannot say that the minute will afford a sufficient inducement to persuade the affiliated stations to cease cancellations and assume the initiative in litigating the validity of the regulations and of the contracts which they undertake to condemn. The affidavit filed in the court below on the application for a stay is to the contrary. And in any case we are of the opinion that there are no equitable principles by which the right of appellant, upon the showing made by its complaint and affidavit, to test the order under § 402(a) can justly be suspended to await action which the station owners may or may not take in assuming the burden of challenging the regulations.

We need not stop to discuss here the great variety of administrative rulings which, unlike this one, are not re-

viewable—either because they do not adjudicate rights or declare them legislatively, or because there are adequate administrative remedies which must be pursued before resorting to judicial remedies, or because there is no occasion to resort to equitable remedies. But we should not for that reason fail to discriminate between them and this case in which, because of its peculiar circumstances, all the elements prerequisite to judicial review are present. The ultimate test of reviewability is not to be found in an over-[fol. 484] refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

We conclude that the Commission's promulgation of the regulations is an order reviewable under § 402(a) of the Act, and that the bill of complaint states a cause of action in equity. The stay now in effect will be continued, on terms to be settled by the court below.

Reversed.

Mr. Justice BLACK took no part in the consideration or decision of this case.

Order of May 3, 1941, as Amended October 11, 1941

Now, therefore, it is hereby ordered, That the following regulations be and they are hereby adopted:

SEC. 3.101. *Exclusive affiliation of station.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

SEC. 3.102. *Territorial exclusivity.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serv-

ing a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call [fol. 485] in its primary service area upon the programs of the network organization.

SEC. 3.103. *Term of affiliation.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, expressed or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

SEC. 3.104. *Option time.*—No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

SEC. 3.105. *Right to reject programs.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

[fol. 486] **SEC. 3.106. Network ownership of stations.**—No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

SEC. 3.107. Dual network operation.—No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network; *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

SEC. 3.108. Control by networks of station rates.—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

[*Effective date.*] These regulations shall become effective immediately; *Provided*, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; *And provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.

The minute of October 31, 1941.

The Commission today adopted the following minute setting forth the procedure that it will follow in applying

the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.

[fol. 488] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 1026

COLUMBIA BROADCASTING SYSTEM, INC., Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.

Appeal from the District Court of the United States for the Southern District of New York

[June 1, 1942.]

Mr. Justice FRANKFURTER, dissenting.

The criteria governing judicial review of "orders" under the Urgent Deficiencies Act were defined by a unanimous Court in *United States v. Los Angeles R. R.*, 273 U. S. 299, 309-10: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." If "broadcasting company" were substituted for "carrier", this analysis of the legal consequences of the action of the Interstate Commerce Commission in the *Los Angeles* case would fit perfectly the legal consequences of the action of the Federal Communications Commission in making public the challenged regulations.

[fol. 489] The fact that an action of an administrative agency occasions even irreparable loss does not in itself afford sufficient grounds for judicial review. Even if the Commission committed a wrong, the question of judicial-reviewability still remains that put in the *Los Angeles* case, 273 U. S. at 313; to wit, is it "a wrong for which Congress provides a remedy under the Urgent Deficiencies Act" of October 22, 1913, 38 Stat. 208, 219, as incorporated in §402(a) of the Communications Act of 1934?

For Congress has not authorized resort to the federal courts merely because someone feels aggrieved, however

deeply, by an action of the Federal Communications Commission. A District Court of the United States can take a case only when Congress has authorized that type of case to be taken. Congress did not leave opportunity for reviewing damaging action by the Federal Communications Commission to the general equity powers of the district courts. It circumscribed the power of the courts in relation to the Commission in the most detailed way. Its incorporation by reference, in the Communications Act of 1934, of the scope of review allowed in reviewing an "order" of the Interstate Commerce Commission gave all the precise, definite, and technical boundaries which the concept of a reviewable "order" had acquired through the decisions of this Court prior to the enactment of the Communications Act. The precise requirements of an "order" of the Commission for purposes of judicial review are therefore as inflexible as though they were written into the Act itself.

Our problem, then, is this: Does the issuance of the chain broadcasting regulations constitute an "order" reviewable in a proceeding brought under §402(a) of the Communications Act, in the light of the settled rules for determining what such an "order" is when a determination of the Interstate Commerce Commission is made the basis of judicial review. It is therefore necessary to put out of mind what this case is not. It is not the invocation of equity jurisdiction in order to avoid threatened irreparable harm resulting from the criminal enforcement of [fol. 490] an unconstitutional statute, as in *Pierce v. Society of Sisters*, 268 U. S. 510. Nor do we have here a resort to equity because it is essential for the protection of asserted rights that criminal prosecutions unauthorized by law be restrained, as in *Shields v. Utah Idaho R. Co.*, 305 U. S. 177, 183.

In promulgating these regulations the Communications Commission merely announced its conception of one aspect of the public interest, namely, the relationship of certain provisions in network-affiliation contracts to the obligation of a station licensee to render the most effective service to the listening public. The regulations themselves determine no rights. They alter the status of neither the networks nor licensees. As such they require nobody—neither the networks, the licensees, nor the Commission—to do anything. They are merely an announcement to the public of what the Commission intends to do in passing upon

future applications for station licenses. No action of the stations or the networks can violate the regulations, for there is nothing the regulations require them to do or refrain from doing.

Announcements of general policies intended to be followed by administrative agencies customarily take any one of various forms. Sometimes they are noted in the agency's annual report to Congress, sometimes in a public announcement or press release, and sometimes, as was the case here, they are published as "rules" or "regulations". See Final Report of the Attorney General's Committee on Administrative Procedure (1941), pp. 26-27. But whatever form such announcements may take, their nature and effect is the same. The reason why the Commission formulated its chain broadcasting policy in the form of a "regulation" is given in its report: "We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice. . . . Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient information is available upon which they may be based." Report on Chain Broadcasting, Federal Communications Commission, Order No. 37, Docket No. 5060, p. 85.

With respect to its jurisdiction over matters relating to radio broadcasting, the Communications Commission is essentially a licensing agency. Its regulatory power over the industry is derived, for the most part, from its authority to grant and withhold station licenses. Under §309 of the Communications Act of 1934 the Commission is required to examine each application for a station license and to determine in each case whether a grant would serve public interest, convenience, or necessity. As was noted in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138, the Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." To that end Congress established an administrative procedure under which the Commission must make a specific determination in each case whether the public interest would be served by granting the particular application before it. No announcement of general licensing policy can relieve the Commission of its statutory obligation to examine each application for a license and

determine whether a grant or denial is required by the public interest.

The Commission recognized this fact in issuing these regulations. It explicitly stated that a determination of the requirements of the public interest will, in spite of the regulations, still have to be made in passing upon particular applications: "Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant." Report on Chain Broadcasting, *supra*, p. 85.

Subsequent to the promulgation of the regulations, the Commission found that substantial modifications were necessary. In its supplemental report on these amendments the Commission gave further evidence of the flexible nature of the regulations: "The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation." Moreover, in its Minute of October 31, 1941, designed primarily to protect the interests of station licensees who contest the validity of the regulations, the Commission again made it abundantly clear that the regulations were not final: "If a station wishes to contest the validity of the Chain Broadcasting Regulations . . . , or the reasonableness of their application to the particular station, its license will be set for hearing."

The regulations do not, therefore, commit the Commission to any definitive course of action in passing upon applications for licenses. Consistently with the regulations (and, parenthetically, consistently with the authority of the Commission to depart from general regulations where such departure is in the public interest, see *Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 285), the Commission is

free to dilute them with amendments and exceptions. The construction of the regulations and their application to particular situations is still in the hands of the Commission. Administrative adjudication is still open. Before its completion it is not ripe for judicial review.

The characteristics of the administrative determinations in all the cases on which the Court's opinion relies were [fol. 493] wholly different. In each one the force of the law either through criminal prosecution or injunction or fine or some other judicial remedy could immediately be brought to bear to enforce the command of the administrative agency. In none of the cases was an administrative action held reviewable which in itself entailed no immediate legal consequences.

Thus, in the *Assigned Car Cases*, 274 U. S. 564, suit was brought under the Urgent Deficiencies Act to annul an order of the Interstate Commerce Commission prescribing for all railroads within its jurisdiction a rule governing distribution of cars for the transportation of bituminous coal. Under §402 of the Transportation Act of 1920, 41 Stat. 456, 476, 49 U. S. C. §1(12)(14), the carriers were required "to make just and reasonable distribution of cars", and the Commission was authorized to "establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad". Failure of a carrier to comply with such regulations issued by the Commission was declared unlawful, subjecting the carrier to a fine of \$100 for each offense. Since the order of the Commission commanded carriers to take specified actions, and since the failure to comply with the order would bring immediate legal sanctions, the order was held reviewable.

Similarly, in *United States v. B. & O. R. Co.*, 293 U. S. 454, the Interstate Commerce Commission required railroads subject to its jurisdiction to equip locomotives with a suitable type of power-operated reverse gear. The Boiler Inspection Act, 36 Stat. 913, 916, expressly provided that violation by a carrier of any rule or regulation issued by the Commission under the Act was punishable by a fine recoverable in a civil action. A suit under the Urgent Deficiencies Act to set aside the Commission's order was therefore entertained.

A. T. & T. Co. v. United States, 299 U. S. 232, was a suit under §402(a) of the Communications Act of 1934, the same provision upon which jurisdiction of the present litigation

[fol. 494] is based, to set aside an order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies within the Act. Section 220(a) authorized the Commission to prescribe such forms of accounts, and §220(d) made the failure or refusal of a company to keep accounts in the manner prescribed by the Commission unlawful, punishable by a \$500 forfeiture for each day of the continuance of the offense. Because of the legal sanctions immediately attaching upon its violation, the order was held reviewable.

In *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, the Commission, under the authority vested in it by §20 of the Interstate Commerce Act, issued orders prescribing forms of accounts, records, and memoranda and calling for annual reports of carriers by water. Section 20(7) made it unlawful for such carriers to keep any accounts other than those prescribed by the Commission. A suit to set aside the orders was therefore entertained. Similarly, in *Kansas City So. Ry. v. United States*, 231 U. S. 423, suit was brought to annul regulations of the Interstate Commerce Commission prescribing a uniform bookkeeping and accounting system for interstate railway carriers. Since carriers who failed to keep accounts as ordered by the regulations were subject to penalties under §20(7) of the Act, jurisdiction was taken. And in *Chicago, R. I. & P. Ry. Co. v. United States*, 284 U. S. 80, the Interstate Commerce Commission prescribed car-hire settlement rules governing use by common carriers of each other's cars. Violation of such rules by carriers was declared unlawful and subject to fines. Consequently, a suit to set aside the rules was entertained.

Of course, the mere fact that an administrative order determines a status does not mean that it is not reviewable. If an administrative determination of status has the effect of subjecting a person to legal obligations, whether embodied in statute or previously formulated administrative commands, or otherwise affecting legal rights, such a determination possesses the elements of a reviewable order. Thus, in *Rochester Tel. Corp. v. United States*, 307 U. S. 125, the Federal Communications Commission had issued orders requiring all telephone carriers subject to the Communications Act of 1934 to file schedules of their charges, copies of contracts with other carriers, etc. Section 203(e) of the Act provides that a carrier which fails or re-

fuses to comply with such rules of the Commission shall forfeit \$500 for each offense, and \$25 for each day of its continuance. After investigation and hearing, the Commission determined that the Rochester Telephone Corporation was a telephone carrier subject to the Act and therefore subject to the previously promulgated general orders directed to carriers within the Commission's jurisdiction. "The order of the Communications Commission in this case was therefore reviewable. It was not a mere abstract declaration of status of the Rochester under the Communications Act; nor was it a stage in an incomplete process of administrative adjudication. The contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority. Into this class of carriers the order under dispute covered the Rochester, and by that fact, in conjunction with the other orders, made determination of the status of the Rochester a reviewable order of the Commission." *Rochester Tel. Corp. v. United States*, 307 U. S. at 143-44. Compare *A. F. of L. v. Labor Board*, 308 U. S. 401, 408. Unlike the action taken by the Federal Communications Commission in the *Rochester* case, its action here carried no directions of obedience of any kind to anyone.

It is said that the regulations derive legal effect through §312(a) giving the Commission authority to revoke licenses, and that "by virtue of the regulations alone", the networks and their affiliates are now subjected to legal detriment. But this is merely another way of phrasing the main contention that the regulations at once and without further [fol. 496] action by the Commission release legal sanctions. But the regulations have no such effect. To be sure, the Commission can revoke a station license "because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application". But the Commission may never require a licensee to file a statement of fact under §312(a); its provisions may therefore never come into operation. In any event, the regulations as such do not subject licensees to any sanctions. A license can be revoked under §312(a) because of the licensee's failure to operate its stations in the public interest, as required by the statute. The regulations adopted by the Commission cannot operate to revoke any

licenses. "It is only after a proceeding has been started (in which the licensee is entitled to a hearing during which the revocation order is suspended) and adversely concluded against a party that legal sanctions come into play—the Commission can bring proceedings to enforce its order of revocation and, correspondingly, the licensee can bring suit under §402(a) challenging the validity of the Commission's termination of the license.

Section 502 of the Communications Act provides that the violation of "any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act" shall be a criminal offense. Would the renewal by a licensee of its network-affiliation contract subject it to the criminal penalties imposed by § 502? Obviously not, for the regulations do not forbid a licensee from taking that or any other action. And, for the same reason, a license could not be revoked under the provision of § 312 (a) which authorizes revocation "for violation of or failure to observe . . . any regulation of the Commission authorized by this Act . . ." If the Commission had issued regulations which ordered licensees to do or refrain from doing something, the problem would be entirely different. Violation by a licensee of such a regulation would be grounds [fol. 497] for revocation of its license, under § 312(a), and for the imposition of criminal penalties, under § 502. And, the other requisites being present, such a regulation could be reviewed as a final administrative determination.

This leaves only the suggestion that since the action taken by the Commission, although not the completion of its adjudicatory process, nevertheless drastically affects substantial business interests, it is proper for the courts to intercede at this stage. Even if this argument were to be considered as if it had never before been made to and rejected by this Court, its infirmities are obvious. As a practical matter, the impact upon the business operations of the networks and their affiliated stations would probably be as disturbing as if the policies formulated in the regulations had been expressed through a press release, or if only the report, which is not only the foundation of the regulations but also embodies them, had been published with the regulations which are only the summary of the report, or if Congress itself had incorporated these regulations into the text of the Communications Act. It will hardly be argued that any of these steps could be the sub-

ject of judicial review before the Commission acted upon particular applications. But assume that the greater formality given to the announcement of the Commission's statement of policy through the regulations intensified the practical business consequences. Congress has not conferred upon the district courts jurisdiction over "practical business consequences". They can review action of administrative agencies only when there is an "order", and when Congress in § 402(a) made only an "order" of the Communications Commission reviewable, it incorporated the settled doctrine established by an unbroken series of decisions in this Court that the courts could review only a final determination by an agency whereby its process has been concluded.

This is not the first time that the federal courts have been urged to sit in judgment upon "practical business consequences" where the action to be reviewed did not represent [fol. 498] the final stage of administrative adjudication. The arguments made in this case have been made in the past but heretofore have always been rejected by this Court. The classic formulation and application of the doctrine of finality as to orders under the Urgent Deficiencies Act was contained in *United States v. Los Angeles R. R.*, 273 U. S. 299. In view of the thoroughness of the argument at the bar, and the weightiness of the opinion, that case has ever since been regarded as furnishing the guideposts in this field of law. It should govern here.

Suit was brought there to annul and enjoin an order of the Interstate Commerce Commission determining the final valuation for rate-making purposes of the Los Angeles & Salt Lake Railroad Company which operated a thousand miles of railroad lines. The valuation fixed by the Commission was \$45,200,000; the carrier claimed that if the Commission had employed proper standards of valuation, the figure would be \$70,000,000, a difference of \$24,800,000. At the time suit was brought approximately 250,000 miles of railroad lines throughout the country were undergoing valuation. The validity of the criteria employed by the Commission in the case of the Los Angeles & Salt Lake Railroad Company was therefore of enormous national significance. In the words of Commissioner Eastman, "This case deals with an issue of greater moment to the country than any that we have ever determined." 73 I. C. C. 523. These issues, involving practically every phase

of valuation law, were canvassed in an adversary proceeding before the Commission lasting nearly a year and a half, resulting in a report of one hundred and forty pages, and expressed in a formal "order" of ten pages. Counsel for the railroad company there, as do counsel for the broadcasting company here, relied upon the practical finality of the order as a basis for review: "As a practical matter, the Commission in any and all proceedings in which it has occasion to use this valuation will give it not *prima facie* but conclusive effect. In the valuation proceeding before the Commission [fol. 499] which resulted in this order petitioner introduced its evidence of the value of the properties and the proceeding resulted in a valuation greatly at variance with the evidence and contentions of petitioner. No greater effect will be given to evidence which petitioner may introduce in some future proceeding before the Commission in an attempt to overcome the *prima facie* effect accorded by the Act to this valuation order. Therefore, unless and until set aside and annulled, this valuation will stand as a continuing menace against petitioner, and may be repeatedly used to petitioner's prejudice in rate, division, consolidation, security-issue and recapture proceedings." Brief for Appellee, pp. 64.65.

The Court specifically referred to this argument of counsel: "One [argument in support of jurisdiction] is that since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public." Finding, however, that the order did not finally determine any legal rights, the Court refused review: "Its [the Commission's] conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction." 273 U. S. at 314-15.¹

¹ To the same effect is *United States v. Illinois Cent. R. R. Co.*, 244 U. S. 82. There the Interstate Commerce Commission issued an order fixing the time and place for hearing complaints made by various coal companies seeking damages against railroads for failing to supply a sufficient number of coal cars for their shipping needs. The railroads brought suit under the Urgent Deficiencies Act to annul this order, alleging that unless the hearing were restrained, the

To argue that irreparable injury implies reviewability is in effect to contend that there must be a remedy because the plaintiff claims serious damage. But in these situations—in reviewing “orders” under the Urgent Deficiencies Act—federal courts can give a remedy only to enforce a [fol. 500] legal right, and a legal right cannot be derived merely by concluding that a particular claim of hardship should afford a remedy. While formally we may appear to be dealing with technicalities, behind these considerations lie deep issues of policy in the division of authority as between administrative agencies and courts in carrying out the constitutional will of Congress. The source of the misconception underlying the claim for equitable relief in this case is the assumption that this is merely an ordinary invocation of equity, as though it were a controversy between two litigants of which only the courts are or can be seized. What we are here concerned with is due regard for the proper distribution made by Congress of legal authority as between two law-enforcing agencies of government, the administrative and the judicial. See *United States v. Morgan*, 307 U. S. 183, 190-91; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134.

This case illustrates anew the influence of a particular instance of felt hardship in derailing legal principles from customary tracks. But this is not an isolated case. If threatened damage through general pronouncement of policy for future administrative action, to equitable review apart from the rule that judicial review is premature because of want of administrative finality, the same basis of irreparable harm which is here equated to jurisdiction will bear rich litigious fruit in the case of “regulations” issued by the Securities and Exchange Commission which are damaging in their immediate repercussions to stock exchange and holding companies, or regulations announced by the Treasury for the guidance of taxpayers but which adversely affect business interests, or regulations by the Federal Power Commission, etc. Suppose, for example, that the Commissioner of Internal Revenue issues a ruling that

railroads would be put to enormous expense and inconvenience. The Court held that the notice of hearing “had no characteristics of an order, affirmative or negative”, and since it “was a mere incident in the proceeding”, the suit could not be entertained. 244 U. S. at 89.

profits derived by radio stations from their network operations are subject to a tax deemed by them onerous and illegal. Could a network successfully bring a suit in equity prior to the imposition of such taxes to invalidate the ruling [fol. 501] on the ground that its practical consequence was the cancellation of or refusal to renew network affiliations? One had supposed that the answer was clearly no. But surely in principle the problem is essentially that of the cases before us.

A final consideration remains. We are not dealing with the reviewability of administrative orders *in vacuo*. The reviewability of an order of the Federal Communications Commission depends upon the statutory scheme of judicial review embodied in § 402 of the Communications Act of 1934. Therefore, even if the regulations could be deemed to possess the essential attributes of a reviewable order, it would not inevitably follow that the order is reviewable in the manner provided for by § 402(a) of the Act. The scope and historical background of the provisions for judicial review contained in the Communications Act of 1934 have too recently been canvassed; see *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, — U. S. —; *Federal Communications Commission v. Columbia Broadcasting System*, 311 U. S. 132; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, to require detailed consideration here. Briefly, the Act created two avenues by which orders of the Federal Communications Commission were open to review by the federal courts. Under § 402(a), incorporating the provisions of the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219, relating to judicial review of orders of the Interstate Commerce Commission, a suit to enforce, set aside, annul, or suspend, an order of the Federal Communications Commission may be brought in a specially constituted district court, with a right of direct appeal to this Court, only if the order does not fall within the exceptions enumerated by § 402(b), namely, orders granting or denying applications for station licenses or construction permits and for renewal or modification of licenses. Review of the orders comprehended within § 402(b) is available only through an appeal to the Court of Appeals for the [fol. 502] District of Columbia, with no right of direct appeal to this Court.

If the regulations do constitute an order, what kind of an order can it be? It must be in the nature of a blanket denial, operating *in futuro*, to be sure, of applications for renewal of station licenses. But the Act expressly precludes judicial review of orders denying renewal applications of licensees in any manner other than that prescribed by § 402(b), to wit, by an appeal to the Court of Appeals for the District of Columbia. As the court below held, the effect of taking jurisdiction in these cases is to substitute a different court and a different procedure for those specified by Congress. This Court has not in the past displayed such an indifference to the particularities of legislation defining the jurisdiction of the lower federal courts. On the contrary, only last Term did the Court insist upon strict compliance with the statutory scheme for judicial review established by the Communications Act of 1934. See *Federal Communications Commission v. Columbia Broadcasting System*, 311 U. S. 132.

Even if we were free to disregard the scheme for judicial review which Congress has established, I could not agree that an appeal under § 402(b) would not be an adequate means for testing the claims made in the present litigation. There is essentially only one issue on the merits in this proceeding, namely, whether the adoption by the Commission of the policies expressed in the regulations transgresses its statutory and constitutional authority. But this issue could be raised and fully determined in an appeal under § 402(b) from an order denying a renewal application. Indeed, in its Minute of October 31, 1941, the Commission explicitly stated that the validity of the regulations could be put in issue in a renewal proceeding. If anything, therefore, the issues in an appeal under § 402(b) would be broader and not narrower than the issues here. Moreover, since the reasonableness of the application of the regulations to the particular situation would also be in issue in the [fol. 503] renewal proceeding, the reviewing court would have before it a record containing elements of concreteness and particularity not present in the record now before us.

The Commission's Minute enables a licensee to contest the validity of the regulations, or the reasonableness of applying them to the particular case, without fear of losing its license. "In order to insure that the station may remain on the air and be in no way injured by any such Commission

proceeding [contesting the validity of the regulations] and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision."

Plainly, therefore, a licensee is under no compulsion to cancel or modify its affiliation contract. Licensees who regard the regulations as invalid are free to continue their existing contracts and at the same time challenge the regulations in the orderly manner provided by the Act—and without any danger of losing their right to continue broadcasting. Similarly, the interests of the networks may be protected through intervention in renewal proceedings. Under the Commission's procedure, Rule 1.102 of the Rules of Practice and Procedure, where a renewal application is designated for hearing because of the licensee's contractual arrangements with others, the latter are customarily permitted to intervene. See, for example, Application of E. J. Regan and F. Arthur Bostwick, Docket No. 5788; Application of John H. Stenger, Jr., Docket No. 5430; Application of Ocala Broadcasting Co., Docket No. 6000; Application of Panama City Broadcasting Co., Docket No. 6001.

[fol. 504] We need go no farther than this litigation to perceive the unfortunate effects of premature judicial review. The chain broadcasting regulations were issued on May 2, 1941, more than a year ago. They were adopted by the Commission as a consequence of its finding, after an investigation lasting more than three years, that certain features of network-affiliation contracts prevented licensees from effectively discharging their obligation to render the fullest service to the listening public. The policy formulated by the Commission may or may not be wise—that is not our concern. But we cannot blink the fact that this litigation has for more than a year prevented the Commission from testing by experience the practical wisdom of a policy found by it to be required by the public interest. The com-

mencement of a proceeding under § 402(b) would not have presented the jurisdictional problems present in this proceeding. Surely those desirous of a speedy adjudication of the issue of the validity of the regulations were aware that the commencement of a proceeding under § 402(a) would not produce a prompt adjudication on the merits, but that it would instead result in postponing for a considerable period the effective date of the regulations, with all the contingent advantages afforded by such postponement.

Hardship there may well come through action of an administrative agency. But to slide from recognition of a hardship to assertion of jurisdiction is once more to assume that only the courts are the guardians of the rights and liberties of the people. In denying that it had power to review the action of the Federal Communications Commission because that body had not yet determined a legal right, the court below, as Judge Learned Hand's opinion abundantly proves, was not respecting a rule of etiquette. On the contrary, it merely recognized that the federal courts are entrusted with the correction of administrative errors or wrongdoing only to the extent of Congressional authorization. To say that the courts should reject the doctrine of administrative finality and take jurisdiction whenever [fol. 505] action of an administrative agency may seriously affect substantial business interests, regardless of how intermediate or incomplete the action may be, is, in effect, to imply that the protection of legal interests is entrusted solely to the courts. The unbroken current of this Court's decisions in construing the scope of judicial review under the Urgent Deficiencies Act, and which is the only warrant for jurisdiction in this case, repels such a contention. The decision should therefore be affirmed.

Mr. Justice Reed and Mr. Justice Douglas join in this dissent.

[fol. 506] IN DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION TO EXPEDITE REARGUMENT ON DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT

Now come the defendants United States of America and the Federal Communications Commission, and pray¹ the Court to reconsider its action of June 18, 1942, postponing further proceedings in these cases until October 8, 1942, and to schedule further argument on the defendants' motions for summary judgment on July 7, 1942, or on such other date during the first two weeks of July as may be convenient.

The principal ground of this petition is that the Court's action of June 18, 1942 is not consistent with the statutory requirement that cases under the Urgent Deficiencies Act "shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day".

[fol. 507] In support of this petition the defendants respectfully show the Court:

(1) These suits were filed on October 31, 1941 and on February 21, 1942 this Court dismissed the complaints for lack of jurisdiction.

(2) When the plaintiffs indicated their intention to appeal to the Supreme Court, all parties cooperated in expediting the appeals so that they could be heard prior to

¹ This prayer is made by petition rather than motion since it can appropriately be considered and acted on without oral argument or convocation of the Court. The plaintiffs in these cases made no formal motion for reargument on the defendants' motion for summary judgment, nor is the Court's action of June 18, 1942 setting the reargument for October 8 and 9, 1942 embodied in an order. As was stated to the Court on June 18, counsel for the plaintiffs agreed (subject, of course, to the Court's direction) that reargument of the motions for summary judgment should be held on June 30, 1942 or some other proximate date which would meet the Court's convenience.

the end of the October, 1941 Term. Seven days after entry of the orders allowing the appeals, the records were filed in the Supreme Court. On March 16, 1942, the Supreme Court entered an order noting its jurisdiction. The appellants' briefs were filed April 13, 1942 and the Government's brief was filed on April 27, 1942. Oral argument began on April 30, 1942 and was concluded on May 1, 1942.

(3) On June 1, 1942, the Supreme Court reversed the order of this Court. Under Rule 34 of the Supreme Court, the mandate would not have been returned to this Court until after the expiration of twenty-five days from the Court's decision. In order that the proceedings could go forward expeditiously, the parties stipulated that the mandate could issue forthwith.

(4) On June 8, 1942, the day the Supreme Court returned the mandate, counsel for the Government telephoned counsel for the plaintiff in No. 16-179 and offered to rest its motion for summary judgment on the argument held in January, without further argument. Two days later counsel for the plaintiff in No. 16-179 informed counsel for the Government that the plaintiffs in both cases wanted further argument and might wish to file additional briefs, but agreed that the reargument should be held at this term of Court. It was stated that counsel for the plaintiffs did not desire a full reargument but would limit themselves to contending further that the case should not be disposed of on the motion for summary judgment, but only after a *trial de novo* and the taking of evidence before the full Court. On June 16 counsel for the plaintiff in No. 16-179 informed counsel [fol. 508] for the Government that the plaintiffs in both cases had selected June 30th as the date for reargument, and would request the Court to convene on that date.

(5) On June 18, 1942, this Court met and considered the parties' request for hearing on June 30. It determined that further proceedings should be postponed until October 8, 1942.

(6) The Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 220, 28 U. S. C. sec. 47, which is expressly made applicable to suits to enjoin the enforcement of orders of the Federal Communications Commission (Communications Act of 1934, 48 Stat. 926, 47 U. S. C. sec. 402(a)), provides in part as follows:

"The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day . . . ; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition . . . shall apply."

The Supreme Court has said that one extraordinary feature of cases arising under the Urgent Deficiencies Act is that:

"Upon both the trial court and the Supreme Court rests the obligation to give the case precedence over others.

.

"In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation." (*United States v. Griffin*, 303 U. S. 226, 232-233.)

See also, *Stratton v. St. Louis S. W. Ry.*, 282 U. S. 10, 14; *Moore v. Fidelity & Deposit Co.*, 272 U. S. 317, 320-321; and *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 545.

[fol. 509] (7) It is believed that to postpone further proceedings in this case until October 8, 1942, would be to nullify the expediting provisions of the Urgent Deficiencies Act. We, of course, appreciate the fact that the dockets of the members of this Court are crowded and that some cases must, therefore, give way to others. However, it is submitted that it is the plain mandate of Congress that cases under the Urgent Deficiencies Act should be given precedence and heard forthwith.

(8) Holding this reargument at an early date will greatly expedite the final disposition of these cases. If the Court agrees with the Government's contention that no *trial de novo* is necessary, the cases will be available for final disposition without further hearing. If the Court determines that a trial should be held, the parties will be so informed

and can immediately commence to prepare for trial, before the Court or before a Special Master (*Borden's Farm Products Co. v. Ten Eyck*, 11 F. Supp. 599, aff'd. 297 U. S. 251). As the situation now stands, there will be a delay of over three months before the parties even learn whether or not there is to be a trial.

(9) The fact that the administrative proceedings before the Commission covered three years in no way affects the need for expedition of this litigation:

(a) It cannot seriously be argued that the Commission should have formulated its policies without careful study and due deliberation. In the nature of things, the careful formulation of important policies by an administrative body, in a field where a full understanding of the facts is essential, is time-consuming.

(b) At the hearing on June 18, 1942, counsel for the plaintiff in No. 16-179 stressed the lapse of time between the conclusion of the hearings before the Commission and the final promulgation of the rules here attacked.² Counsel for the plaintiffs were not, as was the Commission, confronted with the responsibility of comprehending and analyzing 8,713 pages of testimony and 707 exhibits, preparing [fol. 510] a comprehensive and accurate report, and carefully weighing the significance of the facts in order to develop a policy which would serve the public interest. It hardly lies in the mouth of counsel for the plaintiffs to attack the Commission's performance of these difficult functions as too deliberate, particularly since, as the Commission's records disclose, the date for filing briefs before the full Commission was twice postponed at the request of the plaintiffs in these cases.

(c) In any event, since the decision of the Supreme Court it is clear that these are cases under the Urgent Deficiencies Act, and Congress has declared and the Supreme Court has emphasized that such cases must be handled expeditiously. The situation in these cases is in no way unique; rate cases

² For the convenience of the Court, a copy of the Stenographer's Minutes of the proceedings on June 18, 1942, is attached to this petition as Exhibit A. The remarks of counsel for the plaintiff referred to above appear at the top of page 412.

and other regulatory administrative proceedings frequently consume several years, and indeed the more important the case the more likely it is that the administrative proceedings will be lengthy. It is extraordinary to suggest that the mandate of the statute may be disregarded under such circumstances.

(10) Counsel for the plaintiffs have stated to counsel for the Government that the question on which they desire reargument is whether the cases can be decided on motions for summary judgment and the administrative record before the Commission, or whether a *trial de novo* should be held.³ Counsel for the Government believe that, assuming a reasonable degree of restraint by counsel for all parties, this limited degree of reargument need not be very time-consuming.

(11) The opinion of the Supreme Court clearly contemplates that this Court shall determine after receipt of the mandate whether and on what terms the regulations should be stayed. The opinion concludes:

[fol. 511] "The stay now in effect will be continued on terms to be settled by the court below."

The Government regards this as continuing the stay until this Court takes further action, presumably by acting on plaintiffs' motions for preliminary injunction, which are now available for disposition. But it is respectfully urged that such disposition should be prompt, and that further argument on the motions, if any, should be had together with the reargument on the motions for summary judgment.

Under the Urgent Deficiencies Act, temporary stay orders issued by this Court are limited to sixty days. Accordingly, when this Court on March 2, 1942, allowed a temporary stay pending appeal, it limited it "until May 1st, 1942, or the argument of the appeal herein in the Supreme Court of the United States, whichever is earlier." By stipulation of the parties the stay was continued until the last decision day of the October, 1941, Term of the Supreme Court of the United States or until the determination of the pending appeals, whichever is earlier. Thus,

³ See the Stenographer's Minutes of the proceedings on June 18, pages 406, 407.

the stay which the Supreme Court continued is the stay originally granted by this Court on March 2, 1942, as extended by stipulation of the parties until the decision. In view of the statutory provision limiting to sixty days this Court's power to grant temporary stays, it seems highly improbable that the Supreme Court contemplated that the stay, which it continued "on terms to be settled by the court below", would, in the absence of further action by this Court, extend until October 8, 1942, a total of 130 days from the date of the Supreme Court's decision:

(12) As matters now stand, plaintiffs' request for reargument is delaying further proceedings in these cases for several months. In the meantime, the parties do not even know whether or not a *trial de novo* will be had. Wherefore, it is respectfully prayed that reargument be held at [fol. 512] the "earliest practicable day", giving precedence to this case as is required by the Urgent Deficiencies Act.

Respectfully submitted, United States of America,
By Samuel Brodsky, Federal Communications
Commission, By Telford Taylor, General Counsel,
Charles R. Denny, Assistant General Counsel,
Harry M. Plotkin, Counsel.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing "Petition to Expedite Reargument on Defendants' Motions for Summary Judgment" acknowledged and a true copy received thereof this 26th day of June, 1942.

—, Solicitor for National Broadcasting Company, Inc. —, Solicitor for Woodmen of the World Life Insurance Society. —, Solicitor for Stromberg-Carlson Telephone Manufacturing Company. —, Solicitor for Columbia Broadcasting System, Inc. Percy H. Russell, Jr., Solicitor for Mutual Broadcasting System, Inc.

[fols. 513-534] The following was endorsed on the "Petition to Expedite Reargument of Defendants' Motions for Summary Judgment":

"I am in favor of denying the petition.

John Bright, Henry W. Goddard."

6/30/42.

[fol. 535] IN DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRANK E. MULLEN, VICE-PRESIDENT AND GEN-
ERAL MANAGER OF NATIONAL BROADCASTING COMPANY, INC.

UNITED STATES OF AMERICA

Southern District of New York

City, County and State of New York, ss:

FRANK E. MULLEN, being duly sworn, deposes and says:

I am Vice-President and General Manager of National Broadcasting Company, Inc. (hereinafter called NBC), one of the plaintiffs herein. This affidavit is submitted in support of plaintiffs' motion for temporary injunction and as a supplement to my affidavit of January 3, 1942, made in [fol. 536] opposition to defendants' motions to dismiss the complaint or, in the alternative, for summary judgment.

Copies of four letters received by NBC with respect to the Order and Regulations issued by the Federal Communications Commission, Docket No. 5060, after the Commission adopted its minute of October 31, are annexed hereto and marked Exhibits 1 to 4, inclusive.

They demonstrate that the minute did not operate to mitigate the damage to NBC described in my affidavit of January 3, 1942.

Frank E. Mullen.

Subscribed and sworn to before me this 31st day of
August, 1942. William F. Kennedy, Notary Pub-
lic, New York County.

[61.537]

EXHIBIT 1 TO AFFIDAVIT

The Travelers

Broadcasting Service Corporation

WTIC

Hartford, Connecticut

Paul W. Morency, General Manager

November 4, 1941

Mr. William S. Hedges, Vice President
The National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, N. Y.

Dear Mr. Hedges:

The Travelers Broadcasting Service Corporation, operating Station WTIC, having noted the new regulations promulgated by the Federal Communications Commission which are to be effective November 15, 1941, hereby informs you of its intention to abide by those new regulations when effective. This will necessitate some changes in the current contract between the National Broadcasting Company and the Travelers Broadcasting Service Corporation.

If the new regulations become effective November 15, 1941 we will consider those parts of the contract void which conflict with the new regulations. It is our desire to continue our affiliation with the National Broadcasting Company under the terms allowed by the Federal Communications Commission.

Very truly yours (Signed) Paul W. Morency

PWMLB

[fol. 53b]

EXHIBIT 2 TO AFFIDAVIT

WLEU . . .

Broadcasting Corporation

NBC Blue Network

Commerce Building

Erie, Pennsylvania

November 12, 1941

Mr. William S. Hedges,
Vice President
National Broadcasting Company
New York, N. Y.

Dear Mr. Hedges:

In connection with the telegrams you have sent us and the new Network rulings issued by the Commission, that were supposed to be effective November 15th, which, if and when enforced by the F. C. C., will naturally alter the affiliation contract existing at present between the National Broadcasting Company and the WLEU Broadcasting Corporation.

We wish at this time to advise you that if and when this Commission ruling becomes effective, that WLEU will abide by such rulings and regulations of the Commission. The portions of our affiliation contract that conflict with any such rulings of the Commission, will be considered null and void by us on those effective dates as we wish to comply 100% with all F. C. C. rules and regulations as issued by this body on their effective dates.

Very truly yours, (Signed) V. Hamilton-Weir, Vice
President.

VHW:CD

[Vol. 539]

EXHIBIT 3 TO AFFIDAVIT

KSOO

KELO

SIOUX FALLS BROADCAST ASSOCIATION, INC.

Sioux Falls, S. D.

Joseph Henkin, President and Manager

S. Fantle, Jr., Vice President-Treasurer

Morton Henkin, Vice President-Secretary

November 20, 1941

Mr. William S. Hedges
Vice-Pres. in Charge of Stations
National Broadcasting Co.
30 Rockefeller Plaza
New York City

DEAR MR. HEDGES:

We enclose herewith executed amendments sent us by you modifying in certain respects NBC contract "A" and NBC contract "B" for KSOO and the NBC contract for KELO.

We have been notified of the postponement by the Federal Communications Commission of the effective date of the regulations concerning chain broadcasting. Accordingly, we desire to postpone the cancellation date of our present contracts, and we will be very glad to continue our relations with you in the future on whatever basis is required of us as a licensee by the Federal Communications Commission.

Kindest regards.

Sincerely, (Signed) Mort Henkin.

MH:MB

Encs.

[fol. 540]

EXHIBIT 4 TO AFFIDAVIT

February 10, 1942

National Broadcasting Company
RCA Building, Radio City
New York, N. Y.

Attention: Mr. Easton C. Woolley

DEAR MR. WOOLLEY:

With reference to the two attached agreements:

1. One of January 5th specifying an increased rate for Station WFAA, and
2. The letter of January 28th with reference to cut-in announcements.

This is to advise that these agreements have been accepted and can be in operation only so long as they do not offend the Federal Communications Commission's General Order in Docket 5060 which effective date has been indefinitely postponed by the Commission.

Very truly yours, (Signed) James M. Moreney, Vice
President and Secretary A. H. Belo Corporation.

Att.

[fol. 541] IN THE UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

Civil 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICA-
TIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Defendants

Civil 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROAD-
CASTING SYSTEM, INC., Intervenor

Before: L. Hand, C.J., and Goddard and Bright, D.J.J.

On motions by the defendants for summary judgments
dismissing the complaints herein in two actions to "annul"
certain regulations of the Federal Communications Com-
mission and to enjoin the Commission from enforcing them.

[fol. 542] Charles R. Denny for the Commission.

Charles E. Hughes, Jr., for the Columbia Broadcasting
System, Inc.

John T. Cahill for the National Broadcasting Company,
Inc.

OPINION—November 16, 1942

L. HAND, C.J.: These cases come before us a second time
upon motions made by the defendants and the Mutual
Broadcasting System—which has intervened—summarily
to dismiss the complaints. The motions are made upon
the complaints, upon certain affidavits of the counsel for
the Commission, upon the Commission's report and all the
proceedings and evidence before it, and—we shall assume—
upon the affidavits filed by the plaintiffs on their motions
for preliminary injunctions. We shall not repeat the out-

lines of the controversy as set forth in our opinion in 44 Fed. Suppl. 688, and in that of the Supreme Court which reversed our judgments dismissing the complaints, 316 U. S. 407; but shall proceed directly to consider the points raised.

The most important of these is whether the Commission had power to pass the challenged regulations. Everyone agrees that in granting licenses under §309 of Title 47, U. S. Code, it must distribute the available wave-lengths so as to give greatest possible service, and that it must see to it that all applicants have the necessary technical ability to broadcast programs, that the stations are properly constructed and properly manned and do not interfere with other stations, and that the licensees are responsible, morally and financially. All these things and perhaps more, the Commission may regulate in discharge of its duty to promote the "public convenience, interest, or necessity." The regulations at bar have, however, nothing to do with these qualifications of a licensee; they are addressed, not to his ability to broadcast any programs which he may accept, but to his freedom to procure other programs than those to which by contract with, or by the control of, the "networks" he is limited; they touch, not how he shall [fol. 543] broadcast, but how unrestricted he shall be in doing so. The plaintiffs say that, judged both by its history and by its language, the Act gave the Commission power to consider only the qualifications first specified, leaving outside any administrative control all arrangements by which a station secures its programs. They say that, although it is true that §313 makes "all laws . . . relating to unlawful restraints . . . applicable to . . . interstate or foreign radio communications," and that the courts have jurisdiction in this way to annul monopolies or restrictive contracts which affect broadcasting, only courts may do so; the Commission must disregard any such considerations when deciding whether to grant or refuse a license.

Section 303 defines the Commission's powers; its original was §4 of the Radio Act of 1927 which had eleven subdivisions, of which the first ten were the same as the first eleven of §303 except for a new subdivision ("g") introduced into §303. The eighth subdivision ("h") of §4 of the Radio Act (now the ninth ("i") of §303) gave the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting;" and on

it the Commission particularly relied. The plaintiffs answer that it was meant merely to give the Commission control over the power and wave-lengths used by stations while connected with "networks" for "chain broadcasting." It was introduced by an amendment in the Senate and originally read that the Commission should have power, "when stations are connected by wire for chain broadcasting," to "determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting." The first clause of this amendment was indeed limited as the plaintiffs say; but the same was not true of the second clause. "Equitable radio service to the listeners" was a comprehensive phrase, read most naturally, it should include the best possible service compatible with such burdens as it was reasonable to impose upon the [fol. 544] "networks" and their "affiliates"—"equitable," that is, in the sense that the interest of both sides were to be weighed. The fact that the occasion for the amendment appears to have been the Senate's apprehension that the "networks" might drown out "unaffiliated" stations, by no means circumscribed the scope of these words. This amendment finally emerged from Conference and was enacted, in the broad terms we have quoted; it would be altogether unwarranted to assume that it was intended to adopt the limited clause and to abandon the general one. We may start therefore with the strong probability that even in the Radio Act of 1927 the Commission had power by virtue of this subdivision to regulate "chain broadcasting" generally in the interest of "listeners."

The amendment to §303 of the Communications Act of 1934, that is, the interpolation of subdivision "g," confirms this interpretation. That subdivision reads as follows: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." We can see no reason for confining the last clause to scientific or engineering problems; the purpose is apparent to give the Commission power to foster the industry in all appropriate ways. It is not clear that this was a new purpose; but if it was, it infused the powers already granted in the earlier act, broadening them in accord with the changed outlook—

the power granted under subdivision "i" among the rest. The duty—for the power imposed a corresponding duty—to "encourage" the "larger" use of radio incidentally presupposed a power to prevent the frustration of the purpose so disclosed; we are not to construe the section as at war with itself. Therefore, even if §303 stood alone, we should hold that subdivision "i" granted power to the Commission to consider the effect upon a station's choice of programs of any controls or restrictions exercised by the "networks."

However, §303 does not stand alone. In addition to providing that all laws "relating to unlawful restraints and monopolies and to combinations, contracts, or agreements [fol. 545] in restraint of trade" should apply to "radio communications," §313 also took over from §15 of the Act of 1927 the provision that in actions brought under those laws or in proceedings to enforce orders of the Federal Trade Commission, whenever "any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may . . . decree that the license of such licensee shall . . . be revoked." As will be observed, revocation was here made a penalty like other penalties for monopoly or restraint of trade; the courts were not to use it as a means of compelling a licensee to furnish service free from unlawful restrictions, but to punish him for his past misconduct, the discretion accorded them being exercised according to the degree of his "guilt." This was in harmony with the general scheme, for a court is not in good position to know how far a monopolistic or unfair competitive practice may interfere with "the larger and more effective use of radio in the public interest;" if any official was competent to do so, it was the Commission. Section 13 of the Radio Act of 1927 had provided that if a court revoked a license, the Commission must refuse to renew it, but it had stopped there; and, as the law then stood, it might perhaps have been argued with some show of plausibility that an applicant's monopolistic or unfair competitive practices in the past were not relevant to the grant of a license.

However that may have been, § 13 was amended in 1934 by adding a new clause, and the resultant § 311, in addition to retaining the old language forbidding the restoration of a forfeited license, contained a new one providing that the

Commission is "authorized to refuse such station license" whenever the applicant had been "finally adjudged guilty" by a "Federal court of . . . attempting unlawfully to monopolize radio communication . . . or to have been using unfair methods of competition." That power was certainly not to be used as a punishment; the Commission was not to overrule the court which had decided not to impose the penalty. Such a power would have been open [fol. 546] to serious constitutional objection. What use then was the Commission to make of an adjudication of the applicant's "guilt"? Only, we submit, by considering it as evidence that, if granted a license, he would not use it for the "public convenience, interest, or necessity," i.e. that the grant of a license would not "encourage the larger and more effective use of radio in the public interest." The necessary implication from this was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee. Thus, whatever may have been the limits of the Commission's earlier powers, manifestly after 1934 they included a consideration of how far licensees might be improperly restricted in the exploitation of their licenses.

The plaintiffs do not concede even this, as we understand it, but in any event they insist that the exercise of any such power was conditioned upon an earlier adjudication by some court. We can see no reason to suppose (although apparently the Commission does not agree) that an applicant's violation of the statutes against monopoly and unfair competition, as such and alone, ever disentitles him to a license. It is indeed evidence relevant to his fitness for the reasons we have just given; but it is such only as any past conduct may be an earnest of what is to be expected in the future, and because a repetition would be prejudicial to the public interest. We construe this clause of § 311 as going no further than to provide the Commission with an estoppel as to any facts which a court may have found; these may be taken as data for any rational inference that can be drawn from them relevant to the ultimate issue; but "guilt" as "guilt" is not the ultimate issue. Certainly that is the only effect which it is necessary to give the clause; there is not the slightest warrant for inferring that in the absence of an adjudication, the Com-

mission may not determine what has been an applicant's past conduct, or may not consider how far, if repeated, it [fol. 547] would interfere with the fullest use of his license. Whatever may be the mysteries enveloping an adjudication of "guilt" under the Anti-Trust laws which make that issue unfit to be entrusted as such to profane hands, the Commission is certainly peculiarly competent to appraise the effect upon broadcasting of restrictive or monopolistic practices, and is as competent to decide whether an applicant is likely to engage in them as it is to decide any of the other issues which come before it. The decision in *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470, is irrelevant; the only question decided was whether the injury suffered by an existing station was a material factor in licensing a new station.

The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decision until the issues arise upon an application. Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future. It may perhaps be true that a party, who had no notice of the hearings before the Commission and no opportunity to present his side, would be entitled, when applying for a license, to a reconsideration of those findings upon which the regulations rested. None of the plaintiffs at bar are in that position; they were amply advised of what the Commission proposed; they were invited to attend; all but the co-plaintiff "affiliates" of the National Broadcasting Company did so, put in whatever evidence they wished and were heard before the original regulations were passed, and again at the rehearing. They at any rate were accorded all the privileges they would have had if they had intervened in an application for a license. It would be futile after the expenditure of so much time and labor to hold that the proceedings were only advisory and concluded nobody; indeed, the mere fact that the regulations are "orders" reviewable under § 402(a) would seem to preclude such a conclusion. We do not understand the [fol. 548] Supreme Court to mean that every minatory gesture of the Commission is reviewable under that section. The next objection is that the Commission did not really find that the forbidden practices worked against "the pub-

lie convenience, interest, or necessity," but that it rested upon its supposed duty to deny the applications of all who proposed to use their licenses in violation of the Anti-Trust laws. The Commission in one passage of its report does indeed seem so to have understood the statute, though it would scarcely be fair to say that it held as much; but, be that as it may, it did not base its action upon that theory. It made specific findings in the case of each regulation that the contract or the control which it forbade was against the public interest because it took away the stations' free choice without any corresponding advantage to the industry as a whole. Each regulation was a specific exercise of power, addressed to a particular practice which interfered with the most "effective use of radio in the public interest."

The only constitutional objections which we need consider are two: that the standard set by § 303 ("public convenience, interest, or necessity") is too vague; and that the regulations invade the privilege of free speech. Although the Supreme Court has twice at least upheld the standard when applied to the construction of stations or to the allocation of wave lengths (*Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 137, 138; (semble) *Panama Refining Co. v. Ryan*, 293 U. S. 388, 428), the plaintiffs insist that it will not serve if used to regulate the business arrangements of a station. We are assuming that when so used it demands the widest practicable variety in the choice of programs available for broadcasting; that system which will most stimulate and liberate the ingenuity of those who purvey them to the public. There can be no doubt that, if the introductory clause of § 303 will bear that construction the test is definite enough—and indeed peculiarly adapted to the putative proficiency of the Commission in its field. Nor can we see why, when applied to [fol. 549] the issue of the licensee's freedom from restraint, the test is not a fair gloss to be imposed upon the clause. It is impossible in a single rubric to specify all the occasions to which it will apply, and the effort at specification is usually abortive for they cannot all be foreshadowed. It is enough if the delegated power be so defined that a clue can be found in it for dealing with the several occasions which may arise. That seems to us to be the situation here.

The argument drawn from the First Amendment, as we understand it, is this. It is true that the regulations do not profess directly to control what programs the stations may broadcast; but they do so indirectly. They do this by forbidding them to make the forbidden contracts with "networks" even though they believe that these will bring them better programs than they can get in any other way; and it is not necessary for a law directly to control the substance of an utterance for it to invade the right of free speech. We agree that the regulations might be invalid though they do not prohibit programs on the basis of their contents; they do fetter the choice of the stations; absolutely free choice would include the privilege of deciding that they preferred the opportunities open to them under the "networks" contracts to those which would be otherwise available. The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e. the interests, first, of the "listeners," next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks." Whether or not the conflict between these interests and those of the "networks" and their "affiliates" has been properly composed, no question of free speech can arise.

The last question upon the merits is whether the Commission's findings are so plainly without support in the [fol. 550] evidence as to be "arbitrary or capricious," (402(e)); that is, whether the regulations are certain not to promote the "public convenience, interest, or necessity." A majority of the Commission, after a long and painstaking investigation, has concluded that the net result will be to give a larger choice to stations without sensibly diminishing the services of "chain broadcasting," which the report highly commended. We are asked to say that there is no reasonable basis for such a conclusion; to say that no reasonable person could find in the evidence any support for it. The industry at large holds conflicting views; the plaintiffs on the one hand believe that the prohibitions will

in the end destroy "chain broadcasting" altogether; the Mutual Broadcasting System and a number of other interested persons think otherwise. Each side has stated its reasons and the Commission has chosen. It was created to make such choices because Congress believed that it would acquire in its special sphere a skill which courts could not match; and it is now hornbook law that the conclusions of such tribunals are not to be disturbed except in the plainest case. That doctrine applies here with especial force just because the findings are necessarily prospective; time alone can decide their success or their failure. The measure of our power is to say whether there was any substantial evidence that the added freedom given to stations will outweigh the reduction in the opportunities which will remain open to the "networks." We cannot say that there was no such evidence. To take the regulation which is the head and front of the Commission's offending—3.104—it indeed does limit the power of a "network" to furnish large advertisers with the time of all its "affiliates," for it must always run the risk that after its last inquiry a station may have "sold" to another "network" the time which it proposed to "buy" of that station. On the other hand, it is certainly possible that the present contracts give the "networks" so strong a hold upon the industry as to keep down competition which would prove beneficial. Upon such an issue nobody who is not steeped in the details of the business is really entitled to an opinion, and indeed even the opinions of those who are so steeped must be largely speculation. But that does not mean that the industry must be left to itself; the Commission was created precisely to say how far it was best to let things stand, and how far to intervene.

There remains only the question of procedure: whether a motion for summary judgment is proper, or whether, as the plaintiffs argue, the causes should go to trial and be heard upon evidence taken *de novo*. That depends upon what effect we should give to the Commission's findings. If the plaintiffs intervened in a proceeding by one of their "affiliates" for the renewal of a license, they could not compel the Commission to reconsider the findings of the report. As we have said, they had had adequate notice and full opportunity to be heard; indeed neither of the complaints alleges that they had not. Upon appeal to the Court of Appeals of the District of Columbia under §402(b), the

whole record before the Commission upon the hearings which resulted in the regulations would be part of the record, and the only issues open would be whether there was substantial support for the findings in the record, and whether the findings were "arbitrary or capricious," §402(e). That record and those issues are before us here. The plaintiffs did not choose to wait and intervene, but adopted the alternative of an action in equity to "set aside" and "annul" the regulations as "orders." The reason that they have been allowed to proceed in this way is that the regulations inflicted a present injury upon them from which they were entitled to present relief; but the determining issues in each case are the same. Congress, having meant the validity of an order refusing a license to be determined as an appeal upon the record made before the Commission, cannot have meant to allow a larger scope of review because the Commission threatens for the same reasons to refuse all licenses.

This is confirmed by considering what use we could make of any evidence if we took it. It might go to show that the Commission had failed to give adequate notice to the plaintiff of what it proposed, or an adequate opportunity to put in their own evidence, or an adequate hearing upon all the [fol. 552] evidence; but aside from the fact that the record is before us and does not bear out such a contention, neither complaint, as we have just said, alleges anything of the kind. On the other hand, if the evidence went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Commission, without deciding the issues in the first instance ourselves. We have no such power; it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it. *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420; *Acker v. United States*, 298 U. S. 426. If an aggrieved party wishes to supplement that evidence he must apply to the Commission itself, §405.

The plaintiffs somewhat faintly invoke the doctrine of *Crowell v. Benson*, 285 U. S. 22, *Baltimore & Ohio Railroad Co. v. United States*, 298 U. S. 349, and *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38. Assuming that that doctrine is still law (*Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573; S. C. 311 U. S. 570), it does not apply. The "networks" are indubitably engaged in interstate commerce and so are their "affiliates;"

it is a question of law, not of fact, whether the regulations are within the Commission's powers, and the only issue of fact, assuming it can be called such, is whether there was evidence to support the findings. Unless the distinction between what is jurisdictional and what goes to the exercise of a power is to disappear altogether, the Commission's jurisdiction did not depend upon whether they rightly estimated the "public convenience, interest, or necessity."

The complaints will be dismissed; and as there has been no trial, we need make no findings. As before, we will grant a stay, this time until February 1, 1943, or until the argument of the appeal in the Supreme Court, whichever is earlier. The same findings which we then made will serve with slight verbal changes. We are filing the judgments, the stays and findings along with this opinion.

Complaints dismissed.

[fol. 553] IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

Civil 16—178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE
WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON
TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

VS.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICA-
TIONS COMMISSION and MUTUAL BROADCASTING SYSTEM
INC., Defendants

ORDER DISMISSING COMPLAINT—November 16, 1942

Before: L. Hand, C. J., and Goddard and Bright, D. JJ.

This cause came on to be heard at the October, 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof, it is

Ordered, Adjudged and Decreed that the complaint herein be, and the same hereby is, dismissed on the merits.

Learned Hand, Circuit Judge. Henry W. Goddard,
District Judge. John Bright, District Judge.

[fol. 554] IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

FINDINGS OF FACT

I. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; the plaintiffs will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal; except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two and one-half months or until the appeal can be argued, which [fol. 555] ever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiffs arising from enforcement, if the conditions mentioned in the First Finding exist.

That the plaintiffs are entitled to a stay pending their appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of February, 1943, whichever is earlier.

Learned Hand, U. S. C. J. Henry W. Goddard, U.
S. D. J. John Bright, U. S. D. J.

[fol. 556] IN UNITED STATES DISTRICT COURT

DECREE GRANTING TEMPORARY RESTRAINING ORDER

This cause came on to be further heard at the October, 1942, term of this court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the *status*

quo pending an appeal by the plaintiffs to the Supreme Court, for the reasons appearing in the Findings of Fact filed herewith, it is

Ordered, Adjudged and Decreed that until February 1, 1943, or the argument of the appeal herein in the Supreme Court of the United States, whichever is earlier, the Federal Communications Commission be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1941, and which are known as "Order in Docket No. 5060."

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fol. 557] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR A DIRECT APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Hon. Learned Hand, Circuit Judge for the Second Circuit; the Hon. Henry W. Goddard, District Judge for the Southern District of New York; the Hon. John Bright, District Judge for the said District:

Now come National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, plaintiffs herein, and feeling themselves aggrieved by the final order or decree of the District Court rendered and entered in the above-entitled cause on the 16th day of November, 1942, do hereby appeal therefrom to the Supreme Court of the United States because of errors prejudicial to plaintiffs which are set forth in the assignment of errors presented and filed herewith, and pray that their appeal be allowed and that citation be issued as provided by law and that the record on appeal be made and certified and sent to the [fol. 558] Supreme Court of the United States, in accordance with the rules of that Court.

And your petitioners further pray that an order be made fixing the amount of security which your petitioners shall give and furnish upon such appeal.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fol. 559] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Come now National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, plaintiffs in the above-entitled cause, and file the following assignment of errors upon which they shall rely in the prosecution of the appeal to the Supreme Court of the United States herein petitioned for in said cause from the order, judgment and decree of the statutory three-judge District Court of the United States for the Southern District of New York entered on the 16th day of November, 1942.

1. The Court erred in dismissing appellants' complaint on the merits.

2. The Court erred in failing to issue the injunction prayed for by appellants.

3. The Court erred in holding that the Federal Communications Commission has the power to promulgate the Order sought to be set aside in this suit.

[fol. 560] 4. The Court erred in failing to hold, as it should have done, that the Federal Communications Commission has no power to promulgate the Order sought to be set aside in this suit.

5. The Court erred in placing a construction upon the Federal Communications Act of 1934 repugnant to Section 326 of said Act, to the First Amendment to the Constitution

of the United States and to Article I, Section 1 of the Constitution of the United States, in order to support the Order.

6. The Court erred in failing to hold that the Order bears no reasonable relation to the standard of public interest, convenience and necessity adopted by the Communications Act of 1934 and is arbitrary and capricious.

7. The Court erred in holding that the Order is not so plainly without support in the evidence taken before the Commission as to be arbitrary and capricious.

8. The Court erred in dismissing the complaint without holding a trial before it to determine the reasonableness of the relation of the Order to the standard of public interest, convenience and necessity adopted by the Communications Act of 1934.

Wherefore, petitioners pray that the final order or decree entered herein on the 16th day of November, 1942, be reversed and that such other and further relief be granted as to the Court may seem just and proper.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fol. 561] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL

The plaintiffs herein having filed a petition for appeal to the Supreme Court of the United States from the decree entered herein on November 16, 1942, and having filed their assignment of errors, it is

Ordered, that an appeal by petitioners in the above-entitled cause to the Supreme Court of the United States from the decree heretofore filed, and entered herein on November 16, 1942, be and the same is hereby allowed and that the record on appeal be made and certified and sent to

the Supreme Court of the United States in accordance with the rules of that Court, said appeal being hereby made returnable forty (40) days from the date hereof;

Ordered Further, that bond on appeal, to be approved by this Court, is fixed at the sum of \$750.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fol. 562] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL

To the Hon. John J. Bennett, Jr., Attorney General of the State of New York; Samuel Brodsky, Esq., Special Assistant to the Attorney General, Attorney for the United States; Charles R. Denny, General Counsel for the Federal Communications Commission, and Leon Lauterstein, Attorney for Mutual Broadcasting System, Inc.:

Pursuant to the Urgent Deficiencies Appropriation Act of October 22, 1913, Chap. 32, 38 Stat. 219, 220, you are hereby notified that National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, the above-named petitioners, have taken an appeal to the Supreme Court of the United States from the final decree of the specially constituted United States District Court entered herein November 16, 1942, dismissing on the merits the complaint of said petitioners praying that a certain [fol. 563] order of the Federal Communications Commission designated "Commission Order in Docket No. 5060, In the Matter of the Investigation of Chain Broadcasting," promulgating certain regulations relating to radio stations and network organizations engaged in chain broadcasting, entered May 2, 1941, and amended October 11, 1941, be enjoined, set aside and annulled; and the order allowing the said appeal makes the same returnable in the Supreme

Court of the United States forty (40) days from the date hereof.

Dated at New York, New York, this — day of November, 1942:

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fol. 564] IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL

To the Solicitor General of the United States, Solicitor for the United States:

Pursuant to the Urgent Deficiencies Appropriation Act of October 22, 1913, Chap. 32, 38 Stat. 219, 220, you are hereby notified that National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, the above-named petitioners, have taken an appeal to the Supreme Court of the United States from the final decree of the specially constituted United States District Court entered herein November-16, 1942, dismissing on the merits the complaint of said petitioners praying that a certain order of the Federal Communications Commission designated "Commission Order in Docket No. 5060, In the Matter of the Investigation of Chain Broadcasting," promul-
[fol. 565] gating certain regulations relating to radio stations and network organizations engaged in chain broadcasting, entered May 2, 1941, and amended October 11, 1941, be enjoined, set aside and annulled; and the order allowing the said appeal makes the same returnable in the Supreme Court of the United States forty (40) days from the date hereof.

Dated at New York, New York, this — day of November, 1942.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fols. 566-568] Bond on appeal for \$750.00, approved Nov. 25, 1942, omitted in printing.

[fols. 569-571] Citation, in usual form, omitted in printing.

[fol. 572] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DIRECTION RE TRANSMISSION OF ORIGINAL DOCUMENTS

It Is Hereby Directed that the original of Exhibit A to the affidavit of Telford Taylor, of November 5, 1941, be [fol. 573] transmitted to the Supreme Court.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

Agreed to: John T. Cahill, Thomas H. Middleton, David M. Wood, Samuel Brodsky, Spl. Asst. to Atty. Gen.; Charles R. Denny, Gen. Counsel, F. C. C., Leon Lauterstein, John Burns.

[fol. 574] IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the United States District Court for the Southern District of New York:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above-entitled cause and

to include in such transcript of record the following, and no other papers and exhibits, to-wit:

1. Plaintiffs' complaint and Exhibits A through F, inclusive, thereto attached.

2. Plaintiffs' notice of motion and motion for preliminary injunction and for temporary restraining order, together with the supporting affidavits of Niles Trammell (including Exhibits I through III, inclusive, attached thereto), John J. Gillen, Jr. and Edward A. Hanover, annexed thereto.

3. Defendants' motions to dismiss the complaint or, in the alternative, for summary judgment together with the affidavits of Telford Taylor (including Exhibit A therein referred to) and William P. Massing annexed thereto.

[fol. 575] 4. Stipulation and order granting leave to Mutual Broadcasting System, Inc. to intervene.

5. Affidavit of Harold C. Read, submitted by defendants.

6. Affidavits of Sidney N. Strotz (including Exhibits A through E thereto attached), Frank E. Mullen (including Exhibits 1 through 15 thereto attached), and Philip J. Hennessey, Jr., submitted by plaintiffs in opposition to motions to dismiss complaint or for summary judgment.

7. Affidavit of Telford Taylor in opposition to plaintiffs' motion for preliminary injunction.

8. Affidavit of Fred Weber submitted by intervenor in opposition to plaintiffs' motions for preliminary injunction, including appendices A to K, inclusive.

9. Affidavit of Hope H. Barroll, Jr., submitted by intervenor in opposition to plaintiffs' motions for preliminary injunction, including Exhibit A thereto.

10. Affidavits of Niles Trammell, Edgar Kobak and Harold C. Read, submitted by plaintiffs as reply affidavits.

11. Affidavit of Telford Taylor of January 3, 1942, in opposition to plaintiffs' motions for preliminary injunction, including attachments thereto.

12. Stipulation and order granting temporary suspension of Commission's Order in Docket No. 5060.

13. Opinion of statutory District Court dismissing suit for lack of jurisdiction, together with the dissenting opinion of Judge Bright.

14. Order dismissing the complaint.

15. Plaintiffs' notice of motion and motion for temporary restraining order.

16. Opinion of statutory District Court on motion for temporary restraining order.

17. Findings of fact and conclusion of law of statutory District Court relating to temporary restraining order.

18. Decree of statutory District Court granting temporary restraining order.

19. Opinion of United States Supreme Court on appeal from order dismissing the complaint for lack of jurisdiction, together with dissenting opinion of Mr. Justice Frankfurter.

[fol. 576] 20. Petition to Expedite the Argument in Defendants' Motions for Summary Judgment, including Exhibit A thereto and notation of Judges Bright and Goddard denying said Petition.

21. Affidavit of Frank E. Mullen submitted in support of plaintiffs' motion for preliminary injunction and against motion to dismiss complaint or for summary judgment.

22. Opinion of statutory District Court dismissing the complaint on the merits.

23. Order of statutory District Court dismissing complaint on the merits.

24. Findings of fact of statutory District Court.

25. Decree of statutory District Court granting temporary restraining order.

26. Petition for appeal.

27. Assignments of error.

28. Jurisdictional statement (including Exhibits A to D inclusive).

29. Order allowing appeal.

30. Citation on appeal.

31. Notice of appeal.

a. Addressed to Attorney General of the State of New York, et al.

b. Addressed to Solicitor General of the United States.

32. Bond on appeal.

33. Statement calling attention to the provisions of Supreme Court Rule 12 (3).

34. Appellee's and intervenor's admission of service of papers on appeal.

35. Stipulation and order directing Clerk to transmit original of Exhibit A attached to affidavit of Telford Taylor of November 5, 1941.

36. This praecipe and service thereof.

37. Stipulation re correctness of record.

38. Clerk's Ctf.

Said transcript is to be prepared as required by law and the Rules of this Court, and Rules of the Supreme Court [fols. 577-578] of the United States, and is to be filed in the office of the Clerk of the Supreme Court.

Dated: November 25, 1942.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

Service of above praecipe accepted and acknowledged this 27th day of November, 1942. The defendants and the intervenor waive their right to file a designation of additional portions of the record.

Charles Fahy, Solicitor Gen. by Samuel Brodsky, Spl. Asst. to Atty. Gen. Charles R. Denny, Gen. Counsel F. C. C. Leon L  uterstein, Atty. for Mutual Broadcasting System, Intervener.

[fol. 579] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 580] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1942

No. 554

APPELLANTS' STATEMENT OF POINTS AND DESIGNATION OF
PORTIONS OF RECORD ON APPEAL—Filed November 30,
1942

1. Come now the appellants in the above-entitled cause and for their statement of the points on which they intend to rely on their appeal to this Court adopt the points contained in their assignments of error heretofore filed herein.

2. Appellants further state that only the following parts of the record, as filed in this Court, need be printed for the hearing of this appeal:

(a) Plaintiffs' complaint and Exhibits A through F, inclusive, thereto attached.

(b) Plaintiffs' notice of motion and motion for preliminary injunction and for temporary restraining order, together with the supporting affidavits of Niles Trammell (including Exhibits I through III, inclusive, attached thereto), John J. Gillen, Jr. and Edward A. Hanover, annexed thereto.

[fol. 581] (c) Defendants' motions to dismiss the complaint or, in the alternative, for summary judgment, together with the affidavits of Telford Taylor (omitting Exhibit A therein referred to, the original of which Exhibit has been certified to this Court separately and not as a part of said transcript of record) and William P. Massing, annexed thereto.

(d) Stipulation and order granting leave to Mutual Broadcasting System, Inc. to intervene.

(e) Affidavit of Harold C. Read, submitted by defendants.

(f) Affidavits of Sidney N. Strotz (including Exhibits A through E thereto attached), Frank E. Mullen (including Exhibits I through 15 thereto attached), and Philip J. Hennessey, Jr., submitted by plaintiffs in opposition to motions to dismiss complaint or for summary judgment.

(g) Affidavit of Telford Taylor in opposition to plaintiffs' motion for preliminary injunction.

(h) Affidavit of Fred Weber submitted by intervenor in opposition to plaintiffs' motions for preliminary injunction, including appendices A to K, inclusive.

(i) Affidavit of Hope H. Barroll, Jr., submitted by intervenor in opposition to plaintiffs' motions for preliminary injunction, including Exhibit A thereto.

(j) Affidavits of Niles Trammell, Edgar Kobak and Harold C. Read, submitted by plaintiffs as reply affidavits.

(k) Affidavit of Telford Taylor of January 3, 1942, in opposition to plaintiffs' motions for preliminary injunction, including attachments thereto.

(l) Stipulation and order granting temporary suspension of Commission's Order in Docket No. 5060.

(m) Opinion of statutory District Court dismissing suit for lack of jurisdiction, together with the dissenting opinion of Judge Bright.

(n) Order dismissing the complaint.

(o) Plaintiffs' notice of motion and motion for temporary restraining order.

(p) Opinion of statutory District Court on motion for temporary restraining order.

[fol. 582] (q) Findings of fact and conclusion of law of statutory District Court relating to temporary restraining order.

(r) Decree of statutory District Court granting temporary restraining order.

(s) Opinion of United States Supreme Court on appeal from order dismissing the complaint for lack of jurisdiction, together with dissenting opinion of Mr. Justice Frankfurter.

(t) Affidavit of Frank E. Mullen submitted in support of plaintiffs' motion for preliminary injunction and against motion to dismiss complaint or for summary judgment (including Exhibits 1 through 4 thereto attached).

(u) Opinion of statutory District Court dismissing the complaint on the merits.

(v) Order of statutory District Court dismissing complaint on the merits.

(w) Findings of fact of statutory District Court.

(x) Decree of statutory District Court granting temporary restraining order.

(y) Petition for appeal.

(2) Assignments of error.

(aa) Jurisdictional statement (including Exhibits A to D inclusive).

(bb) Order allowing appeal.

(cc) Citation on appeal.

(dd) Notice of appeal.

1. Addressed to Attorney General of the State of New York, et al.

2. Addressed to Solicitor General of the United States.

(ee) Statement calling attention to the provisions of Supreme Court Rule 12 (3).

(ff) Appellees' and intervenor's admission of service of papers on appeal.

[fols. 583-585] (gg) Stipulation and order directing Clerk to transmit original of Exhibit A attached to affidavit of Telford Taylor of November 5, 1941.

(hh) Appellants' praecipe and service thereof.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

Service of the foregoing statement on behalf of each of the appellees is acknowledged this 30th day of November, 1942.

Charles Fahy, by Harry M. Plotkin, Solicitor General of the United States. Harry M. Plotkin, Solicitor for the Federal Communications Commission. Louis G. Caldwell, Solicitor for Mutual Broadcasting System, Inc.

[fols. 586-587] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942.

—No. 554—

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD—Filed December 9, 1942

In addition to the portions of the record designated for printing by appellants, appellee desires that the following parts of the record be printed:

1. Petition to expedite reargument and order of district court noted thereon.
2. Stipulation dated December 8, 1942.

Charles Fahy, Solicitor General of the United States.

Acknowledgment of Service

Service of the foregoing designation is hereby acknowledged this 8th day of December, 1942.

John T. Cahill, Counsel for National Broadcasting Company, Inc. David M. Wood, Counsel for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Counsel for Stromberg-Carlson Telephone Manufacturing Company. Leon Lauterstein, Counsel for Mutual Broadcasting System, Inc.

[fols. 588-589] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 554

STIPULATION AS TO RECORD—Filed December 9, 1942

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the administrative record before the Commission—Exhibit A to defendants' Motion to Dismiss the Complaint or, in the Alternative, for Summary Judgment—which consists of approximately 9,000 pages and 707 exhibits, need not be printed as part of the record

and that any party may refer in the briefs to any portions thereof and may include in an appendix to the briefs such portions of the administrative record as are deemed relevant.

Charles Fahy, Solicitor General of the United States.

John T. Cahill, Counsel for National Broadcasting Company, Inc. David M. Wood, Counsel for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Counsel for Stromberg-Carlson Telephone Manufacturing Company. Leon Lauterstein, Counsel for Mutual Broadcasting System, Inc.

Dated: December 8, 1942.

[fol. 590] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 554

ORDER NOTING PROBABLE JURISDICTION—December 14, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47,055. D. C. F. S., Southern New York, Term No. 554. National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, Appellants, vs. The United States of America, Federal Communications Commission and Mutual Broadcasting System, Inc. Filed November 30, 1942. Term No. 554 O. T. 1942.

On October 11, 1941, the Federal Communications Commission amended the aforesaid order as follows:

“Federal Communications Commission,
Washington, D. C.

October 11, 1941.

Order.

“At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941.

“The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060.

“It Is Ordered, That the Commission's order of May 2, 1941, entered in Docket No. 5060, Be And The Same Is Hereby, Amended in the following particulars:

“Sections 3.102, 3.103, 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

“Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

"Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

"Section 3.104. No license shall be granted to a standard broadcast station which options³ for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours⁴ within each four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.⁵ Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

"The last paragraph of said order is hereby amended to read as follows:

"It Is Further Ordered, That these regulations shall become effective immediately: *Provided*, That,

³ As used in this section, an option is any contract, agreement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

⁴ All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

⁵ These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa."